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In The Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

No. 1515.

THE CITIZENS SAVINGS AND LOAN ASSOCIATION, OF CLEVELAND, OHIO, PLAINTIFFS IN ERROR.

vs.

THE COUNTY OF PERRY, IN THE STATE OF ILLINOIS, DEFENDANT IN ERROR.

WRIT OF ERROR, TO THE CIRCUIT COURT, OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF ILLINOIS,

THE HONORABLE, WALTER Q. GRESHAM, CIRCUIT JUDGE AND THE HONORABLE, WILLIAM J. ALLEN, DISTRICT JUDGE OF SAID DISTRICT, PRESIDING.

☞ *As the Record in this Case has not been printed, the pages referred to, are the pages of the Manuscript, Transcript of the Record, on file in this Case.*

Statement of the Case, Brief and Argument for Defendant, In Error.

THOS. J. LAYMAN,

Attorney for Defendant in Error.

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Statement of the Case, Brief and Argument for Defendant, In Error.

STATEMENT OF THE CASE.

This was an action of Assumpsit, brought by Plaintiff in Error, against Defendant in Error on various Coupons taken from two series of Bonds, purporting to be issued by the Defendant in Error, to-wit:

One series of 100 bonds for $1000 each, payable to the Belleville and Southern Illinois, Railroad Company, dated Jan. 1st, 1871, bearing 7 per cent interest per annum, from date, payable annually, due Jan. 1st, 1891.

The other series consisting of 100 bonds for $1000 each, payable to the Chester and Tamaroa Coal and Railroad Company.

50 of said last named series of bonds, bear date, July 1st, 1871, and the other 50 bonds of said series, bear date Jan. 1st, 1872. All due 20 years after their respective dates, and all bearing interest from their date at 7 per cent per annum, payable Semi-Annually.

The Defendant in Error filed the plea of the general issue, and a stipulation in writing was filed and signed by the Attorneys for Plaintiff in Error, and the Defendants in Error, that all matters might be give in evidence under said plea, of the general issue, the same as if specially pleaded. And by said agreement, a Jury was waived and the Cause was tried by the Court, The Honorable, Walter Q. Gresham Circuit Justice and the Honorable, William J. Allen, District Judge of said District, Associate Judge presiding. (See page 49 of record).

Upon a final hearing of the cause, a judgment was rendered against the Plaintiff in Error for costs of suit.

No opinion was filed in the case but the Court in announcing the decision, stated that both of said series of bonds, were issued without authority of law, and were void. And that consequently the Coupons on which this suit was brought, were also void.

This writ of Error is prosecuted to reverse said judgment.

As the validity of both of said series of bonds are involved in this case, and as the facts relative to each series are different, and the rules of law as to the validity of each ser-

ies, being different; I shall make separate statements and separate briefs and arguments as to each series. Making a statement, brief and argument first as to the series of the 100 bonds, purporting to be issued by Perry County, the Defendant in Error to the Belleville and Southern Illinois Railroad Company.

Statement of the case relative to the 100 Bonds purporting to be issued by Perry County to the Belleville and Southern Illinois Railroad Company.

Certified Copies of the records of said Perry County, read in evidence in this case, show that, on May 17th, 1869, the County Court of said County made an order submitting to the voters of said County, a proposition to be voted on, on the 19th, day of June 1869, to subscribe $150,000 of stock to the Belleville and Southern Illinois Railroad Company.

On the 24th, day of May 1869, said County Court made another order **revoking** the aboye named order made May 17th, 1869. Said copies, of the records of said county, read in evidence in this case, also show that on the 24th, day of May 1869, the county court of said county, made another order, submitting a proposition to the voters of said county, to be voted on, on the 3rd, day of July A. D. 1869, for said county to subscribe one hundred and fifty thousand dollars (150,000) of stock to the Belleville and Southern Illinois Railroad Company.

This last named order further states that, no **bonds be issued or stock subscribed by said Court** to the Belleville and Southern Illinois Railroad Company unless, 1230 legal voters of said county shall have voted in favor of the same, at said election, nor until said company shall have built said road and put the same in operation from Belleville to DuQuoin, through the town of Pinckneyville, with depot and depot buildings at said town, nor unless said road shall

be in operation from Belleville to DuQuoin, on or before the first day of January, A. D. 1871, **and shall locate their machine shops at said DuQuoin.**

Said last named order also provides that, said bonds shall be in sums of not less than $100 nor more than $1000 payable at any time within 20 years from their date, at the option of the county court, bearing interest at 7 per cent per annum, and issued under the **provisions of the act of the Legislature of Illinois, of November 6th, 1849, and act of April 16th, 1869, entitled "An act to fund and provide for paying the Railroad debts of Counties Townships, Cities and Towns."**

The aboved named orders of the county court of said county, will be found on pages 50-1,-2, 3, 4,-5, of the record filed in this case.

The aboved named act of Nov. 16th, 1849, will be found in "Statutes of Illinois," by Scates, Treat & Blackwell, on pages 950-1, and in public session laws of Illinois of 1849, on pages 33-4-5, and is in the words and figures following to-wit:

Section 1 "Be it enacted by the People of the State of Illinois represented in the General Assembly, That whenever the citizens of any city or county in this state, are desirous that, said city or county should subscribe for stock in any railroad company, already organized or incorporated, under any law of this state, such city or county may and are hereby authorized to purchase or subscribe for shares of the capital stock, in any such company, in any sum not exceeding one hundred thousand dollars for each of such cities or counties, and the stock so subscribed for or purchased, shall be under the control of the county court of the county or the common council of the city, making such subscription or purchase in all respects as stock owned by individuals.

§ 2 That for the payment of said stock, the judge of the county court of the county, or the Common Council of the city making such subscription or purchase, are hereby authorized to borrow money at a rate not exceeding ten per cent, per annum and to pledge the faith of the county or city for the annual payment of the interest, and the ultimate redemption of the principal, or if the said judges or Common Council should deem it most advisable, they are hereby authorized to pay for such subscription or purchase, in bonds of the city or county, making such subscription to be drawn for that purpose in sums of not less than fifty dollars bearing interest not exceeding ten per cent per annum, **Provided,** that no bonds shall be paid out, at a rate less than par-value.

§ 3 The railroad companies already organized or incorporated under the laws of this state, are hereby authorized to receive the bonds of any county or city, becoming subscribers to the Capital stock of such company at par, and in lieu of cash, and to issue their bonds bearing interest not exceeding ten per cent per annum for any moneys by them borrowed for the construction for their railroad and fixtures, or for the purchase of engines and cars, and for such purpose may dispose of any bonds by them received as aforesaid.

§ 4 No subscription shall be made or purchase or bond issued by any county or city, under the provisions of this act whereby, any debt shall be created by said judges of the county court of any county, or by the Common Council of any city to pay any such subscription, unless, a majority of the qualified voters of such county or city, (taking as a standard the number of votes thrown at the last general election, previous to the vote had upon the question of subscription under this act for county officers), shall vote for the same; and the judges of the county court of any county, or the Common Council of any city dersiring to take stock as aforesaid, shall give at least thirty days notice (in the same manner as notices are

given for election of state or county officers.) in said counties requring said electors of said counties or said cities, to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for said Capital stock, which they may propose to make. And said notices shall specify the company in which stock is proposed to be subscribed, the amount which is proposed to take and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear, or in case it is proposed to borrow money to pay such subscription, then the notice shall state the terms on which such loan is to be effected; and the opinion of the electors shall be expressed upon their ballots "for subscription" or "against subscription," and counted and returned by the judges and clerks of elections as in other cases. And if a majority of the voters of said county or city assuming the standard aforesaid, shall be in favor of the same, such authorized subscription or purchase or any part thereof shall then be made by said judges or Common Council.

"In case any election had under this act is held upon a day of a general election, then the number of votes thrown at such general election for county officers, shall be the standard of the number of qualified voters as aforesaid.

"No bonds shall be issued under the provisions of this act by any county or city excepting for the amounts required to be paid at the time of subscription, and for the amounts of, and at the time when assessments upon all the stock holders of said company shall be regularly assessed and payable.

§ 5 "This act shall take effect from and after its passage."

"**Approved November 6th, 1849.**"

The above named act of April 16th, 1869, will be found in (public) "session laws of Illinois" of 1869, on pages 316,-17,-18,-19,-20,-21.

Believing that the 2nd and 7th, sections of said act are the only parts thereof, which have any bearing on the questions involved in this case, I will print said sections only.

The second section of said act is in the words and figures following to-wit:

§ 2 "And the county clerk or other proper officer upon the issuing of the bonds in payment of said railroad debt, shall make a registration thereof in a book to be kept for that purpose in his office; showing the date, amount, number, marturity and rate of interest of such bonds, and upon the subscription or donation to what railroad the same was given.

"And the said bonds, and bonds heretofore issued and still unpaid, in order to receive the benefits of this act, shall be registered by the holder thereof at the office of the Auditor of Public Accounts, who shall cause the same to be registered in a book kept for that purpose.

"Such registration shall show the date, amount, number, maturity and rate of interest of such bonds, under what act, and by what county, township, city or town issued, and the auditor shall under his seal of office, certify upon such bond the fact of such registration, for which registration and certificate the Auditor shall be entitled to a fee of one dollar from the holder of each bond."

The 7th section of said act is in the words and figures following to-wit:

§ 7 "And it shall not be lawful to register any bonds under the provisions of this act, or to receive any of the benefits or advantages to be derived from this act, until after the railroad (in aid of the construction of which the debt was incurred), shall have been completed near to, or in, such county, township, city or town, and cars shall have run thereon. And none of the benefits, advantages or provisions of this

act shall apply to any debt, unless the subscription or donation, creating such debt, was first submitted to an election of the legal voters of said county, township, city or town under the provisions of the laws of this state, and a majority of the legal voters, living in said township, city or town were in favor of such aid, subscription or donation.

And any county, township, city or town shall have the right upon making any subscription or donation to any railroad company to prosecute the conditions upon which such bonds, subscriptions or donations shall be made and such bonds, subscriptions, or donations shall not be valid and binding, until such conditions precedent shall have been complied with, and the presiding judge of the county court, or the supervisor of the township, or the chief executive officer of the city or township that shall have issued bonds to any railway or railways, immediately upon the completion of the same near to, unto or through such county, township, city or town as may have been agreed upon, and the running of the cars thereon shall certify under oath that all the preliminary conditions in this act required to be done to authorize the registration of such bonds, and to entitle them to the benefits of this act have been complied with and shall transmit the same to the state Auditor, with a statement of the date, amounts, number, maturity and rate of interest of such bonds and to what company, and under what law issued and there upon the said bonds shall be subject to registration by the State Auditor as is herein before provided."

The certified copies of the records read in evidence, show that on the 5th of December 1870 the county court of said county made another order, that the judge and clerk of said court issue on that day (Dec. 5, 1870) to said Belleville and Southern Illinois railroad company, 100 bonds for $1000 each bearing date Jan. 1st, 1871, bearing interest at 7 per cent, per annum from their date, payable Jan. 1st,

1891, redeemable at the pleasure of the county anytime after Jan. 1st, 1876.

On subscription of said county to the Capital stock of said company in accordance with said order of the county court of said county made May 24, 1869, submitting to the legal voters of said county, the question of subscribing $150,000 to the capital stock of said company under which order a special election was held July 3rd, 1869, and a majority of the legal voters of said county voted for such subscription.

Said order also states that the judge and clerk of said court thereupon proceeded to execute said bonds, numbered consecutively from 1 to 100, and delivered the same to the President and Secretary of said company, who thereupon delivered to said court a certificate of stock showing that said county was then the owner of 1000 shares of $100 each of the Capital stock of said company.

The order last above named dated Dec. 5th, 1870, will be found on pages 53,-4,-5, of the record.

The evidence shows beyond all question, that the orders above named are all, and the only orders ever made by the county court of said county relative to said county taking stock in said railroad company or issuing bonds to it.

The certificate of the Auditor of Public Accounts of Illinois, was read in evidence showing that each of the 100 bonds above named, had been registered in his office, and that they were issued under act of February 14th, 1857.

This certificate will be found on page 69 of the record.

The evidence of Don Onstott and other witnesses will be found on pages 115, and 121,-2, and on pages 219 to 230 of the record, and shows beyond all question that DuQuoin,

(named in the above named order of the county court of said Perry county of May 24th, 1869) is in the south east part of said county and in the years 1869, 1870,-1,-2, was a town of about 1800 inhabitants, that it then was and still is surrounded by large and valuable fields of coal, which was then and still is extensively mined, and that said town was surrounded by valuble farms and orchards.

The evidence of said witnesses also show beyond all question, that the Belleville and Southern Illinois railroad company never located or erected its machine shops at **Du Quoin**, but that it located and erected its machine shops at East St. Louis, in St. Clair County Illinois, about 70 miles west of DuQuoin, and that the erection of said machine shops cost from $100,000 to $150,000, and that from 100 to 150 are employed **daily** to work in said machine shops.

The evidence shows conclusively that the only election held in Perry county to issue said bonds, was held on July 3rd, 1869, and that the last general election for county officers previous to July 3rd, 1869 was held on the 3rd day of November 1868.

The poll books of said last named election were in evidence, and the facts they prove will be found in the record commencing on page 223 and ending on same page. Said poll books show beyond all question, that at said general election for county officers on the 3rd day of November 1868, 2495 votes were thrown in Perry County.

The laws of Illinois in force at the time of said election Nov. 3rd, 1868, and previous and subsequent thereto, relative to counting the votes and making returns, will be found in Statutes of Illinois by Scates, Treat and Blackwell on page 478 and is in the words and figures following to-wit:

Sec. 19 "As soon as all the votes shall have been read

off and counted the judges or board of election shall make out a certificate under their hands, stating the number of votes each candidate received, designating the office for which such person received such vote or votes, as is prescribed and directed by the twenty third section of the thirty seventh chapter of the revised statutes, entitled "Eelections," and the said certificate, together with one of the lists of votes, and one of the tally papers, shall be put into the hands of one of the judges or board of election, who shall, within four days thereafter, deliver the same to the clerk of the county court, or his deputy, at the county seat or place of holding county courts, and when received, such clerk or deputy shall proceed to open, canvass and publish the return from each precinct, township, or place, as is now provided by law."

The twenty third section of the thirty seventh chapter of the revised Statutes entitled "Elections" referred to in the foregoing section and the certificate etc., referred to in said section will be found in said Statute of Illinois by Scates, Treat and Blackwell on page 468 and is in the words and figures following to-wit:

Sec. 23 "When the votes shall have been examined and counted, the clerks shall set down in their poll book, the name of every person voted for, written at full length, the office for which such person received such vote or votes, and the number he did receive, the number being expressed in words at full length; such entry to be made, as nearly as circumstances will admit, in the following form, to-wit:

"At an election held at the house of——, in——, precinct, in the county of———, and state of Illinois, on the——, day of——, in the year of our Lord one thousand eight hundred and———, the following named persons received the number of votes annexed to their respective names, for the following described offices to-wit:

A—B—had fifty-three votes for governor.

C—D—had fifty-one votes for governor.

E—F—had sixty-two votes for lieutenant governor.

G—H—had sixty votes for lieutenant governor.

I—K—had eighty votes for representative in congress.

L—M—had seventy-three votes for senator.

N—O—had sixty-five votes for representative.

P—Q—had fifty-nine votes for representative.

R—S—had fifty-seven votes for sheriff.

T—U—had twenty-two votes for coronor.

V—W—had thirty votes for county commissioner.

(And in the same manner for any other persons or officers, voted for),

Certified by us. }
A—B— }
C—D— } "Judges of the election."
E—F— }

"Atttest:

G—G—, }
I—J—, } "Clerks of the election."

That two sections of the Statute of Illinois last above copied, were in force in Illinois, at the time of the special election in Perry County, on the 3rd day of July 1869, on the proposition for said county to take stock in, and issue bonds to the Belleville and Southern Illinois railroad company and is still in force in Illinois.

At the time of said election July 3rd 1869, there were as shown by the evidence seven (7), Precincts or voting places in said county, to-wit: Tamaroa Precinct, DuQuoin

Precint, Beaucoup Precinct, Pinckneyville Precinct, Grande Cote Precinct, Lost Prairie Precinct and South-western Precinct, See page 222 of record.

The Poll books of said election held in Tamaroa Precinct in said county on July 3rd, 1869, and the certificates etc., thereon were read in evidence in this case and will be found on pages 128 to 138 of the record, and by examination of same it will be seen that the certificates thereon, stating how many votes were cast for, and how many were cast against said proposition for Perry County to take stock and issue bonds to said R. R. Company, are not signed by either of the judges or clerks of said election, (as required by the two sections of the Statute of Illinois, last above copied) but are blank.

The poll books of said last named election held in Du Quoin Precinct, in said county, and the certificates thereon were read in evidence in this case, and will be found on pages 139 to 158 inclusive of the record, and the certificates of the judges and clerks of said election thereon show that the proposition for Perry County to subscribe stock to said Railroad Company received 816 votes, in said last named Precinct, and that five (5) votes were cast against said proposition.

The Poll books of the election of Beaucoup Precinct at said last named election were read in evidence, and will be found on pages 159 to 164 of the record.

The certificates on said last named poll books are not signed by any of the judges or clerks of said last named election, but are blank, and there is nothing to show how many votes were cast for, or against said proposition, for said county to take stock in said R. R. Company.

The Poll books of the election held in Pinckneyville Precinct, at said last named election, were read in evidence, and will be found on pages 165 to 176 of the record.

The certificates on said last named poll books are not signed by any of the judges or clerks of said election, but are blank, and there is nothing to show how many votes were cast for, or against said proposition for said county to take stock, in said R. R. Company.

The poll books of the election held in Grande Cote Precinct, at said last named election, were read in evidence, and will be found on pages 178 to 194 of the record.

The certificates on said last named poll books are not signed by any of the judges or clerks of said election, but are blank; and there is nothing to show how many votes were cast for, or against said proposition, for said county to take stock in said R. R. Company.

The poll books of the election held in Lost Prairie Precinct at said last named election, were read in evidence, and will be found on pages 185 to 191 of the record.

The certificates on said last named poll books, are not signed by any of the judges or clerks of said election, but are blank; and there is nothing to show how many votes were cast for, or against said proposition for said county to take stock in said R. R. Company.

The poll books of the election held in South Western Precinct, at said last named election, were read in evidence, and will be found on page 192 of the record.

The certificates on said last named poll books are signed by the judges and clerks of said election, and said certificates show, that at said election in said last named Precinct, the proposition for said county to take stock in said R. R. Company, received 59 votes; and that 2 votes were cast against said proposition.

By examination of said pool books of the election held July 3rd, 1869, it will be seen that said poll books show, beyond all question, that 1851 votes were thrown at said election; and the certificates of the judges and clerks on said poll books show, that only 875 votes were for, and said county subscribing stock to said R. R. Company.

There is nothing to show whether any of the other votes cast at said election, were in favor of said subscription or against it; but it will be seen that said proposition, for said county to take stock in said R. R Company, lacked 51 votes of receiving a majority of the votes cast at the election on July 3rd, 1869; and there having been cast (as heretofore shown) at the general election for county officers of said county, on Nov. 3rd 1868, 2495 votes.

Taking that, as a standard (as required by the act of Nov. 6th, 1849,) said proposition at said special election, on July 3rd 1869, lacked at least 373 votes of receiving a majority of the votes of Perry county.

One of the bonds of the series last above named was read in evidence and is in the words and figures following to-wit:

"UNITED STATES OF AMERICA. [$1000]

"No. 1.

United States Of America,
State of Illinois,
Perry County.

State Of Illinois
Bond.

"Know all men by these presents, that twenty years after date the county of Perry, in the State of Illinois, promises to pay to the Belleville and Southern Illinois Railroad Company,

or bearer, One Thousand Dollars, for value received, with interest from date at the rate of seven per cent per annum, payable annually on the presentation of the proper coupon hereto annexed. (1000)

"This bond is one of a series of one hundred of like tenor and date, issued under the authority and in accordance with the requirements of an act of the Legislature of the State of Illinois, entitled "An Act to incorporate the Belleville and Southern Illinois Railroad," approved February 14th, 1857, and is redeemable at the pleasure of said county at any time after the first day of January, A. D. 1876.

"In witness whereof, I, Charles E. R. Winthrop, Judge of the County Court of Perry County, have hereunto set my hand and caused the seal of said county to be affixed and the clerk to countersign the same, at Pinckneyville, the first day of January, A. D. 1871.

CHARLES E. R. WINTHROP,

"[SEAL.] County Judge."

"J. CARROLL HARRIS,
County Clerk.

On the back of said bond is the following:

"**Auditor's Office, Illinois,**
Springfild, Jan. 2d, 1871

I, Charles E. Lippincott, Auditor of Public Accounts, of the State of Illinois, do hereby certify that the within Bond has been registered in this office this day, pursuant to the provisions of an act entitled, "An Act to fund and provide for paying the railroad debts of counties, townships, cities

and towns," in force April 16th, 1869.

"In testimoney whereof, I have hereunto subscribed my name and affixed the seal of my office, this day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT,
Auditor, P. A."

(See page 76 and 77 of record,)

The evidence shows that the above bond is a correct copy of each of the other bonds of said series excepting their numbers. The recitals on the face of the bond copied above show that said series of bonds were **issued under under the authority** and in accordance with the requirements of an act of the Legislature of the State of Illinois entitled "An Act to incorporate the Belleville and Southern Illinois Railroad "approved February 14th, 1857." The above named act of February 14th, 1857, will be found in "Session Laws of Illinois" of 1857, on page 707,-8,-9,-10,-11,-12. There is nothing in said act or any part of it relative to a county subscribing stock to said railroad company except section 9 which is in the words and figures following to-wit:

§ 9 The directors of said company, after the same is organized, shall have power to open books, at such time and places as they may deem proper, for the subscription of stock until the whole amount of Capital stock shall be subscribed, or such parts and amounts thereof as they shall desire to have subscribed; and said directors are hereby authorized and empowered to take and receive subscriptions to their said Capital stock, on such terms, and in such amounts as they may deem for the interest of the said company, and as they may prescribe by their by-laws and regulations, from any other railroad company or corporation, and from any county, city, town or village; and any such subscription shall be valid and binding upon any railroad company, corporation,

county, city, town or village making the same, **Provided,** said subscriptions shall be made, in every respect, subject to the provisions and restrictions of an act supplemental to an act entitled "An Act to provide for a general system of railroad incorporations," approved November 6th, 1849; **And provided further,** said company shall be authorized to take or receive subscriptions to their Capital stock, payable in real estate. And all owners of real estate may pay for their subscriptions to the Capital stock of said company execute their notes, with mortgage upon the whole or any part of their real estate, for the security of said notes, at a rate of interest to be agreed upon by said company and the said owners of real estate, not exceeding ten per cent per annum."

The separate section of the constitution of Illinois of 1870 went into force July 2nd, 1870. It will be found in "Revised Statute of Illinois," on page 82 and is in the words and figures following to wit: "No county, city, town, township or other municipalty, shall ever become subscriber to the Capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation. **Provided, however** that the adoption of this article shall not be construed as affecting the right of any such municipality to make subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

The validity of all of these bonds was passed upon. The Supreme Court of Illinois in the case of Onstott vs. The People Ex-rel, reported in 123rd Ill., commenceing on page 489 and ending on page 495 and all of said bonds were held in that case to be void, the opinion was announced in January 1888.

Brief for Defendant in Error, relative to said bonds purporting to be issued by Perry County to the Belleville and Southern Illinois Railroad Company.

FIRST.

There was no vote of the people of Perry county, on the proposition for it to subscribe stock and issue bonds to said railroad company, except the vote at the special election held in said county on July 3rd, 1869, and as there is no evidence showing that the proposition recieved a majority of the votes of the county, but the evidence shows that it lacked 51 votes of receiving a majority of the votes cast at said election, and also lacked 372 votes of recieving a majority of the votes of said county.

Taking as a standard the number of votes thrown at the last general election previous thereto, for county officers, which was held Nov. 3rd, 1868, and as the certificates of the judges and clerks of said election of July 3rd, 1869, fail to show said proposition received a majority of the votes of said county, said series of bonds and each of them are void.

Act of Illinois Legislature, approved November 6th, 1849, printed in the foregoing statement of this case. Sections 19 and 23 of the election laws of Illinois, printed in the foregoing statement of this case.

The People Ex-rel vs. Nordheim et al, 99th Ill., pages 553 to 564 inclusive.

Piatt vs. The Poeple Ex-rel, 29th Ill., 6,-7,-8,-9.

Chestnutwood vs. Hood, 68th Ill., 138. People vs. Hillard 29th Ill., 425. People Ex-rel Ruyle, 91st Ill., 528.

SECOND.

There being no recitals in said bonds showing for what purpose they were issued, nor as to the authority for their issue, it devolved on the Plaintiff in Error to aver and prove by evidence aliunde, that the bonds were issued for some purpose, authorized by the Statute of Illinois; and having failed to do so as required by law, the court below **did not** error in holding said bonds void. Dilton on Municipal bonds page 17 Sec. 8. Thayer vs. Montgomery County 3rd Dillon C. C. R. 389. Nashville vs. Ray 19th, Wall 468.

THIRD.

Said bonds show by recitals on their face, that they were issued under the act approved February 14th 1857, printed in the foregoing statement of this case, and the certificate copy of the registration of said bonds by the Auditor of Illinois, showing said bonds were registerep in his office, and the affidavit of the County Judge of said county to have said bonds registered were both in evidence in this case, and both state that said bonds were issued under said last named act; and as there are no recitals in said bonds as to any other law, and as the Statute of Illinois authorizing the registration of said bonds, (printed in the foregoing statement of this case) made it the duty of said Auditor in registering said bonds, to show under what act they were issued, and said last named Statute also made it the duty of said County Judge to state in said affidavit, under what act they were issued.

I insist that said bonds were issued under said act of Feb. 14th, 1857, and that it cannot now be insisted or argued that they were issued under any other act, nor that they have any legality or validity, unless it is from said last named act; and as there is no power whatever in said last named act to issue said bonds, said bonds are absolutely void.

Hill vs. Memphis, 134th U. S. 190 and authorities there cited.

Gaddis vs. Richland county, 92 Ill. 126 and authorities there cited.

Lippincot vs. Town of Pana, 92nd Ill. 34, and authorities there cited.

McClure vs. Township of Oxford, 4th Otto 429.

Pitzman vs. Village of Freeburg, 92nd Ill. 113.

Mills, vs. St. Clair County, 2nd Gillman 228.

Charles River Bridge vs. The Warren Bridge, 11th. Peters 420 and authorities there cited.

Fertilizer Co. vs. Hyde Park, 97th U. S. 659.

Thomas vs. Railroad Co. 101st U. S. 71.

Common wealth vs. Erie and Northwestern Railroad Co. 27th Pa. St. 339.

Dillon on Municipal corporation Vol. 1. page 173, Section 35.

Cooley on Taxation, page 209 and authorities there cited.

Dillon on Municipal Corporatins, Vol. 2, Sec. 605 and authorities there cited.

English vs. The People 96th Ill. 569 and authorities there cited.

Cooley's Constitutional limitations, (first edition) page 518.

Hardin vs. Indianapolis and St. St Louis R. R. Co. 65th Ill. 90.

Hewit vs. Normal school District, 94th Ill. 532 and authorities there cited.

People Ex-rel vs. Johnson, 100 Ill. 544.

Welch vs. Post 99th Ill. 475.

Soder vs. Henry County 26th Iowa 264.

Police Jury vs. Britton, 15th Wallace 566.

Dillon's law of municipal bonds, Section 6, page 13, and authorities there cited.

FOURTH.

The County Court by the order of May 24th, 1869 (referred to in the foregoing statement), submitted a proposition to the voters, to be voted on, July 3rd 1869, for Perry county to subscribe $150,000 stock to said railroad company, to be paid in bonds of said county; the bonds to be issued under the act of the Legislature of Illinois, of Nov. 6th, 1849, and act of April 16th, 1869.

There is nothing whatever in the act of April 16th, 1869, which authorized Perry County to hold said election, to subscribe said stock, or issue said bonds to said Railroad Company; and the only law which authorized said county to hold said election, to take stock or issue bonds to said Railroad Company, was said act of Nov. 6th 1849; and as the 4th, Section of that act made it the imperative duty of the County Court, to fix the amount of the proposed subscription to be voted on, not exceeding $100,000; and said county court, having submitted a proposition to be voted on, by the voters of said county, to subscribe $150,000 to said Railroad Company, and said voters having voted on said proposition for $150,000 at said special election held in said county on July 3rd 1869, I insist that neither said vote, nor said election, were authorized by law; and that said vote, (if a majority had voted in favor of the propo-ition) conferred no power whateyer on said county to issue said bonds, or subscribe stock to said R. R. Co., and that said election and said vote were a nullity.

The order of May 24th, 1869, submitting said proposition for $150.000, was not a statutory proposition, and the vote cast thereon, on July 3rd 1869, was wholly unauthorized, and conferred no power on said county, to issue said bonds.

Chestnutwood vs. Hood, 68th Ill. 136-7.

City of Champaign vs. Harmon, 98th, Ill. 494.

Dillon on Municipal corporations, Section 381.

C. & I. R. R. Co. vs. City of Sparta, 6th Ill. 507

People vs. Town of Lena, 67th, Ill. 65.

Marshall vs. Silliman, 61st Ill. 230.

Lippencot vs. Town of Pana, 92nd, Ill. 31.

Gaddis vs. Richland county, 92nd, Ill. 123,-4.

City of Champaign vs. Harmon, 98th, Ill. 494.

Dillon on Municipal corporations, Section 381, and authorities there cited.

FIFTH.

The special election held in Perry County July 3rd, 1869, having been held under the act of Nov. 6th, 1849, (printed in the foregoing statement of this case) and the act of April 16th, 1869, (a part of which is printed in the foregoing statement) said bonds having been issued (as heretofore shown) under said act, Approved February 14th, 1857, and the seperate section of the constitution of Illinois, (heretofore printed in the foregoing statement) having gone into force July 2nd, 1870, and said bonds having been issued after that date, to-wit: On the 1st day of January 1871, their issue was not authorized by a vote of the people, prior to the adoption of said seperate section of the said constitution above named, and their issue was prohibited by said seperate section above named, and they are void.

Sec. Seperate section of the constitution of Illinois of 1870, above named and printed in the foregoing statement of this case.

SIXTH.

The seperate section of the constitution of Illinois (printed in the foregoing statement) went into force July 2nd, 1870, and allowed subscription by a county to be made to a railway company, only where the same was authorized under a law then existing, by a vote of the people prior to July 2nd, 1870.

The evidence shows that on May 24th, 1869, the county court made order submitting to the voters of said county, a proposition to take $150,000 stock, in said railroad company and for same in bonds of said county.

In said proposition terms and conditions were imposed among which were the following to-wit:

That no bonds be issued, or stock subscribed by said county to said railroad company, unless 1230 legal voters of said county, shall have voted in favor of the same at said election, nor until said company shall have built said railroad, and put the same in operation from Belleville to DuQuoin, through the town of Pinckneyville, with Depot, and Depot buildings at said town, nor unless said road shall be in operation from Belleville to DuQuoin, on or before the first day of January A. D. 1871, **and shall locate their machine-shops at said DuQuoin.**

There is no evidence whateyer, showing that 1230 legal voters voted in favor of said propostion, nor that said railroad was built and put in operation from Belleville to DuQuoin, through the town of Pinckneyville, with Depot and Depot buildings, at said town, nor that said road was put in opera-

tion from Belleville to DuQuoin, on or before the 1st, day of January A. D. 1871, the plaintiff was not entitled to recover, in this case, unless it prove that these conditions had been complied with, the burthen of proof being on the plaintiff, as to a compliance with these terms and conditions.

The evidence shows that said railroad company **never located or erected its machine shops at DuQuoin, but that it located** its machine-shops at East St. Louis, in St. Clair County, Illinois, about 70 miles west of DuQuoin, and that the erection of said machine shops cost from $160,000 to $150,000, that from 100 to 150 men are employed daily, in said machine shops.

Hence said bonds were void, and the plantiff was not edtitled to a judgment in this case, because said terms and conditions were not complied with, by said railroad company.

Onstott vs. The People Ex-rel 123rd Ill. 489 and authorities there cited.

The German Savings Bank vs. The County of **Franklin, Illinois, decided by this court in Dec. 1888 and reported** in 128th, U. S. page 526, and authorities there cited.

Williams vs. The People Ex-rel 132nd Ill. page 574 to 588.

The opinion in the last named case, was rendered in April 1890.

Eddy vs. The People Ex-rel 127th Ill 428.

Middlefort vs. Aetna Life Insurance Company, 22nd Ill. 562.

People vs. Town of Waynesville 88th, Ill. 469.

People vs. Jackson County 92nd, Ill. 451,-2.

Richeson vs. The People Ex-rel, 115th, Ill. 450.

Town of Eagle vs. Kohn 84th, Ill. 292.

Jackson County vs. Brush, 77th, Ill. 59.

Williams vs. Town of Roberts 88th, Ill. 20.

Wright vs. Bishop 88th, Ill. 302.

Buchannan vs. Litchfield, 12th, Otto 29.

McClure vs. Township of Oxford 4th, Otto 432.

Dillon on Municipal Corporations, Section 55, and authorities there cited.

Town of Prairie Grove vs. Lord 97th, Ill. 172.

Argument for Defendant in error as to the 100 bonds, purporting to be issued to said R. R. Company.

FIRST.

The Poll books of the general election for County officers, in Perry County, held Nov. 3rd, 1868, are in evidence in this case, and show that 2495 votes were thrown at said election, (See pages 222,-3,-4 of record), 1249 would have been a majority of the votes thrown at said election.

The Supreme Court of Illinois in Piatt vs. The People Ex-rel 29th, Ill. 67, hold that poll books of an election, are evidence of the number of votes thrown at the election.

The poll books of the special election, held July 3rd, 1869, and the certificates of the judges and clerks of the election thereon, are in evidence and said last named poll books show that 1851 votes were thrown at said last named election; and the certificates of the judges and clerks thereon, of said last named election, show that only 875 votes were thrown at said election (held July 3rd 1869) in favor of said proposition, for said county to take stock in said R. R. Company.

Said proposition lacked 51 votes of receiving a majority of the votes thrown at said last named election, and there having been thrown (as heretofore shown) at the general election for county officers of said county, on Nov. 3rd 1861, 2495 votes, said proposition lacked at least 373 votes, of receiving a majority of the votes of said county at the election held July 3rd, 1869.

There are no recitals in said bonds, that there was any election, authorizing their issue, nor any reference thereto in any way; hence the only evidence that their issue was authorized by a vote of the people, is the certificates of the judges and clerks of the election, for the statute makes them evidence as to how the vote was cast; that part of the statute is printed in the foregoing statement of this case.

The poll books of the election, held July 3rd, 1869, in DuQuoin Precinct, and in Southwestern Precinct, have certificates on them signed by the judges and clerks of said election, and they show, that in DuQuoin Precinct 816, votes were thrown in favor of said proposition, and in Southwestern precinct, 59 votes were thrown in favor of said proposition; the certificates of the judges and clerks on all the other poll books, at said last named election are **blank**, not **signed.**

The Supreme Court of Illinois, in passing on the statute (heretofore printed in the foregoing statement of this case) relative to the returns of elections, and the certificates of the judges and clerks on the poll books, say in the case of The People ex-rel, Nordheim, et al. 99th Ill. on pages 561,-2.

"And since persons equally honest might, in the absence of express statutory proyisions, on the subject widely differ, as to what would be a sufficient statement of the result of an election, and as to what would be a sufficient authentication of such a statement, the legislature has with a view of obviating all embarrassment and doubt on this subject, expressly de-

clared what facts shall appear on the face of the returns, and the manner and form in which they must be authenticated, and this declaration of the legislature will be regarded as mandatory.

"To permit any substantial departure from these plain provisions of the statute, would be in effect to abrogate them altogether, and leave the judges of elections in making out and certifying returns, to act as fancy or inclination, might lead them in each particular case, which would eventually lead to great abuses in our election system."

And in the same case on page 562, the court further say, **"The certificates showing the result of the election, were not signed by the judges of the election, nor tested in the names of the clerks as required by statute.**

"The statement indorsed on the poll books, with respect to the result, were not vouched for, by any one, and the canvassers had no more right to act upon them, without amendment, than if they had been blank pieces of paper."

The 4th section of said act of 1849 (heretofore printed) provides, that the returns of the election, on the proposition to take stock in, and issue bonds to a railway company, shall be counted, and returned, by the judges and clerks of election as in other cases.

This showing that the judges and clerks of elections of of this character, should determine the result of the vote, and not the County Court.

Certainly the evidence shows beyond all question, that the issue of these bonds were not authorized by a vote of the people of Perry county, and as there was no power to issue

them, unless authorized by a vote, and as there is no recital in any of said bonds, that there was a vote authorizing their issue, how can it be argued that there is any legality or validity in any of said bonds?

SECOND.

There is no evidence in the record showing for what purpose these bonds were issued, nor is there any recitals in any of the bonds showing for what purpose they were issued, nor that there was any vote authorizing their issue, nor is there any evidence showing that any notice was given of the election held July 3rd 1869.

I insist that all these facts should have been proven by plaintiff, to entitle it to a judgment in this case; and having failed so to do, the judgment in this case should be affirmed.

THIRD.

Each of said 100 bonds show by recitals on their face, that they were issued under the authority of said act, approved February 14th, 1857, the affidavit of the county judge of Perry county to have them registered, and the certified copy of the registration of said bonds, both show they were issued under said act, and the Statute of Illinois, (printed in the foregoing statement of this case) required both the registration of said bonds by the Auditor, and the said affidavit of the county judge, to have them registered, to show under what act they were issued.

There can be no question as to them being issued under said act of February 14th, 1857.

These bonds each on their face show, that they were issued under said act, and referred to the source of power to

issue them, and any person dealing in them, only had to read said act to see, that the county officers had no power to issue the bonds.

Gaddis vs. Richland County 92nd, Ill. 126, and authorities there cited.

Lippencot vs. Town of Pana, 92nd, Ill. 34, and authorities there cited.

In delivering the unanimous opinion of this court, in McClure vs. Township of Oxford, 4th, Otto 429, Chief Justice Waite said, "Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute under which they were issued, and of all its requirements." The only reference in said act of 1857, relative to a county subscribing stock, is section 9, which is printed in the foregoing statement of this case; by reading said section it will be seen, there is nothing in it or any part of it, authorizing a county to subscribe stock to a railroad company, nor is there any reference in said section or any part of it, to a county issuing bonds, or levying taxes, or paying interest.

I insist that said section never gave any power to Perry County to issue said bonds. The Supreme Court of Illinois construed section 9, (above referred to) in case of Pitzman vs. Village of Freeburg, 92nd, Ill. 113 and 114. In that case, suit was brought by Pitzman, against the village of Freeburg, on interest coupons which had been attached to certain bonds, issued by said village, under the provisions of said act approved February 1857, to said Railroad Company. The Supreme Court of Illinois, in passing on that case, after quoting the **above named section 9,** say: Bearing in mind that there is no implied authority, in municipal corporations, to incur debts or borrow money, in order to become purchasers or subscribers for shares of Capital stock of

railroad corporations, and that such authority must be conferred by express grant, and can not be assumed from implication or inuendo merely' it would seem evident that there was no power here conferred upon appellee, to make subscription for shares in the Capital stock of the Belleville and Southern Illinois Railroad Company.

The section of the railroad companies charter, (quoted above section 9), does not assume to confer any power on municipal corporations, it simply confers power on the directors of the railroad company to receive subscriptions, on such terms and in such amounts, as they may deem for the interest of the company, and as they prescribe by their by-laws and regulations.

The grant is to the directors, and to no one else; and the gist of it, is the discretionary powers conferred in respect to the terms, and amount of the subscription to be made."

I deny the power of Perry County, under section 9, of said act of February 14th, 1857, or any part of it, to issue said bonds.

In Mills vs. St. Clair County, 2nd, Gillman, 228, the Supreme Court of Illinois say:

"Public grants should not be extended by implication, in favor of the grantee, beyond the natural and obvious meaning of the words employed, even if by such construction the grant is utterly defeated."

The same rule is announced in Charles River bridge, vs. Warren bridge, 11th Peters 420.

This court in the leading case of Hill vs. Memphis, 134th, U. S. 198,-9, in passing on the validity of municipal bonds issued to a R. R. Co., announce the rule to be, that a power conferred

by statute on a municipal corporation, to subscribe for stock in a railway corporation, does not include the power to create a debt, and to issue negotiable bonds representtng it, in order to pay for that subscription; and in the same case also holds, that all grants of power to a municipal corporation, to subscribe for stock in railways, are to be construed strictly, and not extended beyond the terms of the statute.

This court in case of Fertilizer Co., vs. Hyde Park 659, say: "The rule of construction in this class of cases, is that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded, but what is given in unmistakeable terms, or by an implication equally clear.

"The affirmative must be shown,

"Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public wellfare. It is axomatic in the jurisprudence of this court."

The same rule is announced in Thomas vs. Railroad Company 101st, U. S. 71. In case of common wealth vs. Erie and Northwestern R. R. Co., 27th Pa. St. 339, Black, Chief Justice, in rendering the judgment of the court say, "That which a company is authorized to do by its acts of incorporation, it maydo; beyond that, all acts are illegal, and all power must be given in plain words, or by necessary implication. * * *

"All power not given in this direct and unmistakable manner is withheld.

"In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by logic, or inferential reasoning. If you assert that a coporation had certain privileges, show us the words of the legislature con-

ferring; failing in this you must give up your claim, for nothing else can posibly avail you.

"A doubtful charter does not exist, because whatever is doubtful, is decisively certain againt the corporation."

The same rule is announced by Judge Dillon, in his work on Municipal corporations, Vol. 1 page 173, Sec. 55.

The whole current of authorities at home and abroad, announce the rule, that all doubts in a charter must be resolved in favor of the state; and that when any reasonable doubt, as to the meaning of any part of a charter arises, we at once solve that doubt by saying, that the thing does not exist in it; and also that what is not positively and plainly expressed, or just as positively and plainly implied, does not exist in it.

Judge Cooley in his able work on taxation, on page 209 says. "In the construction of any grant of power to tax, made by the state, to one of its municipalities, the one which is accepted by all authorities is, that it should be with strictness.

"The reasonable presumption is held to be, that the state has granted in clear and unmistakble terms, all that it has intended to grant at all; and whatever authority the municipal officers assume to exercise, they must be able to show their warrant for, in the words of the grant.

"There is no inherent power in municipalities, to levy taxes; they can only tax as the state in its wisdom, has thought proper to permit, and if the state has erred in its direction of strictness, the legislature alone can correct the evil."

Let us take into consideration, the policy of the state of Illinois, in granting power to counties to take stock in, and issue bonds to railroad companies, (that the power does not exist unless it is given in express terms), and bear in mind that the legislature, when it passed said act of 1857, and the

rule of construction in such cases, and see if there was any power to issue said bonds.

When we consider the policy of the state, and rule of construction in such cases, is not the power to issue said bonds under said act as clearly denied, as if there had been a provision in said act, prohibiting said county from issuing bonds?"

Judge Dillon in his work on municipal corporations, Vol. 2 Section 605, says, "It is a principle universally declared and admitted, that municipal corporations can levy no tax general or special, upon the inhabitants or property unless the power be plainly and unmistakably conferred.

"It has indeed often been said, that it must be specifically granted in terms, but all courts agree that the authority must be given either by express words, or by necessary implication; and that it cannot be collected by doubtful inference, from other powers relating to other subjects, nor deduced from any consideration of advantage.

"It is important to bear in mind, that the authority to municipalities, to impose burdens of any character, is wholly statutory, and as its excercise may result in divesture and transfer of property, it must be clearly given and strictly pursued."

The same author in the same work, Vol. 1 page 226 Section 106, says: "The courts concur with great unanimity in holding, that there is no implied authority in municipal corporations, to incur debts or borrow money, in order to become subscribers to stock of railway companies.

"To become stock holders in private corporations, is manifestly foreign to the usual purposes intended to be subserved by the creation of corporate municipalities, and the practice of bestowing powers of this kind is of recent origin, and

hence the rule in order to exist, the authority must be conferred and cannot be deduced from ordinary municipal grants."

The same author in the same work, Section 381 says: "In favor of bonafide holders of negotiable securities the corporation may be estoped to avail itself of irregularities, in the exercise of power conferred, but it may always show, that under no circumstances, could the corporation lawfully make the contract of the character in question."

The Supreme Court of Illinois, in case of English vs. The People 96th, Ill. 569 say. "It devolves upon the people to show, that the tax which is sought to be collected, has the sanction of law to support it."

"Legislative authority must be shown for every levy of taxes." Cooley's Const. Lim. (1st, edition) page 518. "And this rule applies to the political divisions of the state, the same as it does to the state at large." Ibid.

The reason of the above rule is plain, as the power to tax is strong and arbitrary, and pervades all of the powers of the government, and reaches all classes of people, and can be used in favor of some persons, and against others, so as to enrich one class and bankrupt the other, if there is no limitation of the taxing power under the first constitution of Illinois, (const. of 1818) there was no limit on the power of its legislature to borrow money. Under that constitution, Illinois borrowed large sums of money, and used it in making internal improvements, in which it was then largely engaged; but it is a matter of history that it resulted in bankrupting the state, and greatly injuring its inhabitants.

The Supreme Court of Illinois, in Hardin vs. Indianapolis & St. L. R. R. Co., 65 Ill. 90, announce the rule, that counties in Illinois, were created for govermental purposes, and that when they are authorized to subscribe for stock, in

aid of a railroad under a statue, that the power to do so must not only be clearly conferred, but strictly pursued.

In Hewit vs. Normal school Dist., 94th, Ill. 532, the court say: "Municipal corporations are not usually endowed with power, to enter into traffic or general business, and are only created as auxillaries to the goverment, in carrying into effect some special goyermental policy, or to aid in preserving the order, and promoting the well being of the locality over which their authority extends. Where a corporation is created for business purposes, all persons may presume, that such bodies when issuing their paper, are acting within the scope of their power. Not so with municipalities. Being created for govermental purposes, the borrowing of money, and the purchase of property on time, are not inherent, or even powers usually confered, and unless endowed with such powers in their charters, they have no authority to make and place on the market such paper, and persons dealing in it must see that the power exists." "This has long been the rule of this court."

"Board of Superyisors vs. Farewell, 25 Ill. 181.

"Clark vs. Hancock County, 27 Ill. 305.

"Marshall County vs. Cook, 38 Ill. 44.

"Wiley vs. Silliman, 62 Ill. 170.

"Hardin vs. Rockford R. I. Railroad Co., 65 Ill. 90.

"McWharton vs. People, ibid 290.

"Town of Big Groye vs. Willis, ibid 263.

"We might refer to other cases where it has been held that bonds issued without authority are void even in the hands of the purchaser before maturity without actual notice."

In case of People Ex-rel vs Johnson, 100 Ill. 544, Justice Mulkey, in delivering the unanimous opinion of the Supreme Court of Illinois said: "If any one proposition

can be regarded as clearly settled beyond all question, it is that the officers or official agents of a county or other corporation have no power, without express legislation for that purpose, to issue commercial paper and thereby impose the municipality the duties and liabilities incident to such paper."

In Welch vs. Post, 99th Ill. 475, the Supreme Court of Illinois say: "There is no implied authority in municipal corporations to make donations to railway companies, and to issue interest bearing bonds in payment. It must appear there is express enabling legislation to that effect before municipal corporations can properly assume to exercise such extraordinary powers."

"Counties are involuntary political organizations created by general statute to aid in the administration of government. The statute confers upon them all powers they possess, prescribes all the duties which they owe, and imposes all the liabilities to which they are subject."

Soper vs. Henry County, 26 Iowa, 264. In Police Jury vs. Britton, 15 Wallace, 566, the court say: "The ordinary powers possessed by counties as agencies of the state in the administration of public affairs do not give the incidental power to issue negotiable bonds and coupons. It would be anomaly justly to be deprecated for all our limited territorial boards charged with certain objects of necessary local administration, to become fountains of commercial issue capable of floating about in the financial whirlpools of our large cities."

Judge Dillon, in his able work on the law of Municipal Bonds, Section 6, pages 13 and 14 says: "They (municipal corporations) have in general but one mode of meeting their liabilities, and that is by taxation; and it is upon this resource that the creditor must be taken to rely. For hundreds of years in England such coporations have existed without it ever being contended that they could without express authority issue commercial paper. Private corporations are much

more vigilant and watchful of their interest than it is possible for municipal corporations to be. The frauds which unscrupulous officers will be enabled to practice, if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or citizen will be helpless to prevent, is a strong argument against the judicial establishment of such power. And the argument is unanswerable when it is remembered that in ascertaining the extent of corporate power there is no rule of safety but the rule of strict construction, and that such an implied power is not necessary, however convenient it may be at times to enable the corporation to exercise its ordinary and usual express powers, or to carry into effect the purposes for which the corporation is created. We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the **implied power** to borrow money for its ordinary purposes, and as incidental to that the power to issue commercial securities. * * * It is an admitted and undisputed doctrine that the power of public and municipal corporations to subscribe to the stock of railway companies and issue bonds therefor, **must be expressly conferred.**"

If said act of 1857, conferred power on Perry County to issue bonds, I ask First, What law authorized Perry County Court or other county officer, to call an election to vote on the proposition for the county to subscribe the stock and issue the bonds?

Second; What law fixes the time, notice should be given of the election?

Third; What amount of stock could said county subscribe under said act?

Fourth; What number of votes were required to carry the proposition?

Fifth; What law fixes and prescribes the time said bonds may run?

Sixth; What law determines whether said bonds may or may not draw interest?

Seventh; What law fixes the rate of interest they may draw?

Eighth; What law protects the county againt these bonds being sold at a discount?

We find all these points well guarded in all the general laws of Illinois, as well as private charters, whereever the legislature gave authority to municipalities to issue bonds, in payment of stock to railroad companies. To uphold these bonds, issued under said act of 1857, it seems to me would require at the hands of the court, too much work, which properly belongs to the legislature.

FOURTH.

There being no power given to Perry County to subscribe stock or issue bonds to said railroad company, under said act of 1857, the only law authorizing said county to subscribe stock or issue bonds to said R. R. Co., was the general railroad law of Illinois, approved Nov. 6th 1849, printed in the foregoing statement of this case. This law of 1849 limited the amount of subscription by a county to $100.000. The fourth section of law required the county to give notice of the amount proposed to be subscribed &c.

The order of the county court, of May 24. 1869, (in evidence in this case) submitted to the voters of the county a proposition to be voted on, on the 3rd, day of July, 1869, to subscribe one hundred and fifty thousand dollars ($150,000) to this railroad company, to be paid in county bonds, **to be issued under the provisions of the act of the legislature of Illinois, of November 6th, 1849," and act of April 16th, 1869.** The order of the county court, made December 5th, 1870, orders the Judge and clerk to

issue and deliver to said railroad company 100 bonds for $1000 each, on account of the subscription of said county to the Capital stock of said railroad company, made by the court in accordance with an order of said court made May 24, 1869, submitting to the legal voters of Perry County the question of subscribing **one hundred and fifty thousand dollars** ($150,000) to the Capital stock of said railroad company.

Said order recites: "**Under which order a special election was held on the 3rd, day of July, 1869, and a majority of the legal voters of said county voted for such subscriptions.**"

I insist that as the county could subscribe only $100,000 to this railroad company, and as it could not subscribe any amount unless authorized by a vote of the people, and as the statute made it the imperative duty of the County court to fix the amount of the proposed subscription to be voted on not exceeding $100,000; and that the county having submitted a proposition to be voted on by the voters to subscribe $150,000 to this railroad company, and the voters having on the 3rd, day of July 1869, voted on that proposition, that said vote was not authorized by law, and that it conferred no power whatever on the County court to subscribe the stock or issue the bonds. This act of 1849, extended the powers of the county and increased the burdens of taxation, and should be strictly construed.

The Supreme court of Illinois in case of Chestnutwood vs. Hood, 68 Ill. 136,-7, say: "It is a well settled rule of construction that statutes extending the powers of corporations or increasing the burdens of taxation, must be construed."

The same rule is announced in Smith's Com. 818. As laws of this character must be strictly construed, and as this act of 1849 limited the amount of subscription by the county

to $100.000, and required the county court to determine the amount proposed to be subscribed not exceeding $100.000; and as said order of the County court of May 24, 1869, submitting said proposition for $150,000, provided that the bonds should be issued under said act of 1849 and act of April 16, 1869. I insist that said proposition was not a statutory proposition and that the vote cast at the election held thereon, on the 3rd day of July, 1869, was wholly unauthorized and void, and conferred no power on the County court to issue the bonds.

The Supreme Court of Illinois in city of Champaign, vs. Harmon, 98th, Ill. say: "Municipal corporations are creatures of the statute and can only exercise such powers as are expressly conferred, or such as arise by implication from general powers granted. Corporations must act from express authority or power necessary as incidental to some corporate purpose. It has no right to make laws or contracts. It is a creature of power and not of right, and must live by power and act by express consent of the legislature, or from necessity germane to the purpose of its creation." It is a well settled rule of law that the unauthorized acts of county officers are void. Dillon on Municipal Corporations, Section 381.

It certainly can not be argued that the county court had any authority to submit to the voters the proposition to subscribe $150.000; nor can it be argued that the voters of said county had any right to vote on the proposition to subscribe $150.000; hence, both the order of the county court submitting the proposition for $150,000 and the vote cast thereon, were absolutely void and conferred no power whatever to issue the bonds.

The voters of the county could authorize the county court to subscribe the stock and issue the bonds, **only** when they (the voters) were called to vote at an election which

was authorized by law, and as there was no law authorizing Perry county to vote on a proposition for that county to issue $150,000 in bonds to this railroad company, the election held July 3rd, 1869, amounted to nothing more than a mass meeting, and conferred no authority to issue the bonds. To hold otherwise would be to violate a positive requirment of the statute. It would be to set at defiance the legislative will declared and exercised for the protection of the people who are taxed to pay these bonds. To hold bonds valid, issued under an election not authorized by law, is to say that the express will, of the legislature shall not be binding, and that acts of county officers in violation of a positive statute of the state shall be as valid as if done in strict compliance with the laws of the state.

All public officers must act within the scope of their authority or their acts will be void. This court can make no valid order or decree unless it first had jurisdiction of the subject matter and parties. And the power in all such cases is derived solely from the law. The issuing of interest bearing county bonds involves the levying of taxes for the payment of the interest, and to that extent deprives the tax payer of his property, and that cannot be done except by authority of law. And it is no answer to say that the election held July 3rd 1869, resulted in a majority in favor of issuing the bonds, as majorities are just as powerless to divest persons of their property as are minorities, unless it be done in the manner prescribed by law. And as there was no law authorizing the County court of Perry county to call an election to vote on a proposition to subscribe $150,000 to this railroad, the vote cast July 3rd, 1869, (even if a majority had been in favor of issuing the bonds) conferred no power to issue the bonds.

The city of Sparta in Illinois, was authorized by statute to subscribe stock to the C. & I. Railroad company, if authorized by vote of the people, and pay same in city bonds to

run ten years. The city submitted a proposition to the voters to subscribe stock to that railroad company, and provided that the bonds should run twenty years, and this proposition was carried by a majority of the votes cast at the election.

The Supreme Court of Illinois, in the case of the C. & I. Railroad company, vs. City of Sparta, 67th, Ill. 507, in passing upon the validity of said proposition and said vote, hold that neither said proposition nor the vote thereon, gave any power to issue the bonds, and that the election was a nullity; that there was no authority to vote on a proposition to have bonds run twenty years. In the case at bar the proposition voted on, not being authorized by law, the election certainly was a nullity. Certainly the act of 1849, means what it says; and to issue bonds under that act, certainly there must be such an election as is provided for in said act. I insist that the election held on July 3rd, 1869, on this proposition to subscribe $150.000 **was like a judicial proceeding where there was no jurisdiction.** That there was no vote of the people of Perry county in the manner required by law, that there was no power conferred on Perry county by said election, and that it was a nullity. I insist that I am fully supported in this position by the rule of construction announced by Supreme Court of Illinois in case of People, vs. Town of Santa Anna, 67th, Ill. 57.

People vs, Town of Leana, 67th Ill. 65.

Marshall vs. Sillman, 61th, Ill. 230.

Lippencot vs. Town of Pana, 92, Ill. 31.

The Supreme Court of Illinois in case of Gaddis vs. Richland county, 92, Ill., pages 123,-4, say: "The power to create a debt by a county, or to subscribe stock in a railroad, or to issue bonds to raise money to aid in its construction, must be conferred by grant from the law making power,

and when the grant is made and the power is conferred it must be substantially pursued. If a particular mode is prescribed the municipality can not adopt a different mode, and if the power is conferred on one set of officials or individuals it cannot act through or by a different set of officials or persons. The municipality have no discretion in executing the power, nor can they adopt a mode they deem better adapted to accomplish the end. The general assembly had the power to confer the authority or withhold it, or in conferring it to impose such terms and conditions as they chose. It was an exercise of power by them in the government of the state, and that body were the sole judges as to the manner in which the power should be exercised, and the functionaries or individuals who should exercise it." There is no conflict on this rule of law at home or abroad.

FIFTH.

The election to subscribe the stock and issue the bonds was held July 3rd, 1869. The order submitting the proposition to be voted on at said election was made May 24th, 1869. And in the proposition submitted in this order to the voters it was provided that the bonds be issued under the provisions of the act of the legislature of Illinois of November 6th 1849, and act of April 16th 1869. This was a part of the proposition voted on by the voters of the county on July 3rd 1869. The bonds were issued bearing date January 1st, 1871. One of the separate sections of the present constitution of the state prohibits the subscription of stock by a county to any railroad company, except where the same was authorized under existing law by a vote of the people prior to the adoption of said section. Said section was adopted on the 2nd day of July 1870, and was the organic law of the state on that subject from that date. By examination of the bond read in evidence in this case, and is a true copy of each of the other bonds of said series except their numbers,

it will be seen that neither of said bonds purport to be issued by virtue of said election held in said county July, 3, 1869, nor in accordance with said election, nor in accordance with said order of court, made May 24, 1869; nor in accordance with or the authority of any order of said county court nor in accordance with any vote of the people of said county; nor is any reference made in said bonds in any way whatever to said act of November 6, 1849, nor said act of April 16, 1869.

Neither the word vote, voters, or election, or either of them, is mentioned in said bonds, nor is there any reference in said bonds to either of said words. There is not one letter or word in said bonds which even attempts to show or recite that they were issued in accordance with a vote of the people, or that any election was ever held or vote cast relative to their issue. And I insist, that as these bonds were issued long after the adoption of the present constitution, and as the evidence in this case shows conclusively that there was but one proposition submitted to the voters to be voted on, to subscribe stock to this railroad company, and that proposition was voted on, at the election held in said county July 3rd, 1869; and as that proposition voted on at said election provided that the bonds be issued under said act of 1849, and act of April 16th, 1869; and that the vote cast at said election was for issuing said bonds under said act; and as there is not one word in any of the orders made by said county court relative to said act approved February 14th, 1857; and as the bonds in the case at bar show on their face that they were issued in accordance with, and under the authority of said act of 1857 and refer to no other act, that the issue of said bonds was not authorized by a vote of the people prior to the adoption of said section of the constitution; but that the issue of said bonds and each of them are in direct conflict with the constitution, and that their issue was prohibited by the constitution and they are void.

One of the propositions voted on at the election on July 3rd 1869, was that the bonds be issued under said acts of 1849 and 1869; they never voted to issue bonds under said act of 1857. Certainly it cannot be said that these 100 bonds (which show conclusively on their face that they were issued under said act of 1857) were ever authorized by a vote of the people. Can it be argued that where the people have voted to issue bonds under a certain law, and the county officers issue bonds under another law, that the bonds so issued were authorized by a vote of the people. Certainly not. There was ample authority under said act of 1849, for Perry county to have issued $100.000 in county bonds to this railroad company, if the people had authorized it by a vote in the manner prescribed by said act. Now the evidence shows that there was but one proposition to take $150.000 stock in this railroad company, and that there was but one election held in said county relative to this matter, and that was the election held on said proposition July 3rd 1869. Now if the proposition voted on had been for $100.000 only, in bonds to said railroad company, and recited on the face of said bonds that they were issued under said act of 1849, and authorized by a vote of the people at said election, held July 3rd 1869, and suit had been brought against the county on the coupons of said bonds, and a plea had been interposed by the county stating that said election of July 3rd, 1869, was the only election held authorizing the subscription and issue of bonds, and that Perry county, on the first day of January, 1871, issued to said railroad company, 100, for $1 000 each in payment of the subscription to said railroad company, under said act February 14th, 1857. Such a plea would certainly present no defence, and would be bad on general demur in such a case. Would not the bonds issued under the law of 1849 be valid, and the bonds issued under said act of 1857 void? Both series could not be authorized by a vote of the people. If any power or

authority was ever conferred on Perry county by the vote at the election held July 3rd 1869, was that power ever exercised in anyway by the county in issuing the bonds under said act of 1857. Certainly not. The county never was in any way authorized by a vote of the people to issue the bonds under the act of 1857. The vote of the people being the charter of the authority of the county officers in the premises; and as they had no power in the matter except such power as was conferred by a vote of the people, and as the people never in any way by their votes authorized the issue of bonds under said act of 1857, and as said bonds as heretofore stated show on their face that they were issued under said act of 1857, and do not in any way recite that their issue was authorized by a vote of the people, and as there is no evidence ever tending to show that their issue was authorizing by a vote of the people, it certainly cannot be claimed that the issue of these bonds were ever authorized by a vote of the people of Perry county. I insist that Perry county, since the adoption of the present constitution, had no power to issue bonds to this railroad company, unless it had been authorized to do so by a vote of the people under a law which existed at the time of the adoption of the constitution; and that the law referred to in the constitution must not only have been in force at the time of the adoption of the constitution (July 2, 1870) but it must have been a law expressly authorziing an election, the subscription of stock, and issue of bonds, etc; and the vote must have been under such law, and the bonds must have been issued under it. It certainly can not be claimed that a county can submit a proposition to the people to issue bonds under a certain law, and after the people have voted in favor of a proposition, issue bonds under a different law, and the bonds so issued be athorized by a vote of the people. Certainly nothing of this kind was ever intended by the framers of the constitution. Should not this separate

section of the constitution, like laws extending the powers of corporations or increasing the burdens of taxation, be **strictly construed."**

The county officers of Perry county could act only as authorized by a vote of the people at the election held July 3rd, 1869, and certainly the vote cast at that election was the charter of the authority of the county officers. They possessed such powers as had been conferred on them by the vote at said election, but no other powers. If the county officers of Perry county had any power in the premises it was to carry out the will of the voters as it had been expressed in the election held July 3, 1869. But I insist that the proposition voted on at said election was not a proposition which was authorized by the statute, that the vote cast at said election conferred no authority on the county officers in the premises, and that said election was a nullity.

The people of Perry county never voted in favor of issuing the 100 bonds under the act of February 14th 1857.

If the election held July 3rd 1869, gave power to the county to issue the bonds under the law of 1849, the county did not exercise that power in issuing these bonds, and the power (if any) conferred by that vote has not been exercised or exhausted by the county in issuing these bonds, hence they are void.

If power was conferred on the county by that election to issue bonds, it has never been exercised or carried out in anyway.

SIXTH.

The present constitution of the state allows subscriptions to be made by a county to railway companies **only** where the same were authorized under existing law by a vote of the people prior to July 2nd 1870. The evidence in this case shows that on the 24th day of May, 1869, the county court

of Perry county entered of record the following order, to-wit: "And now on this 24th day of May, A. D. 1869, it is ordered by the court that an election be held at the usual place of voting, in the several precinct of the county of Perry on the third day of July, A. D. 1869, by the judges of elections, appointed at the September term, A. D. 1868, to ascertain if the County Court of said county shall subscribe one hundred and fifty thousand dollars of stock to the Belleville & Southern Illinois Railroad Company. And be it further ordered that no bonds be issued or stock subscribed by said court to the Belleville & Southern Illinois Railroad Company, unless twelve hundred and thirty legal voters of said county shall have voted in favor of the same at said election nor until said company shall have built railroad, and put the same in operation from Belleville to DuQuoin, through the town of Pinckneyville, with depot and depot buildings at said town; nor unless said road shall be in operation from Belleville to Du Quoin, on or before the 1st day of January, A. D. 1871, **and shall locate their machine shops at said Du DuQuoin.**"

The evidence also shows that said railroad company never located its machine shops at DuQuoin, but located its machine shops in East St. Louis, in St. Clair County, Ill., about 70 miles west of DuQuoin. (See pages 220 and 221 of record) That DuQuoin is situated in the Southeast part of Perry county Ill., that in the year 1869, 1870, 1871, 1872, it was a town of about 1,800 inhabitants; then was, and still is surrounded by large and valuable fields of coal, which was then, and still is extensively mined; and then was, and still is surrounded by large and valuable farms and orchards.

The evidence also shows that the erection of the machine shops of said company cost from $100.000 to $150.000 and that from 100 to 150 hands are employed daily in said machine shops.

The above order proyided that no bonds should be issued or stock subscribed unless the machine shops of said company were located at DuQuoin. Yet on January 1st 1871, the county court issued and delivered to this railroad company 100 bonds of said county for $1,000 each, bearing 7 per cent interest. It certainly can not be argued that these bonds were issued according to the terms and conditions existing between the county and the railroad company at the time of the adoption of the present constitution. The county court had no power to issue the bonds unless the machine shops had been located at DuQuoin; nor did it have the power to waive them, as the power of the county to waiye this condition was taken awiy by the new constitution. The location of the machine shops of this railroad company was an inducement to the people of Perry county to vote in favor of the subscription and issuing the bonds.

The evidence shows that these machine shops built at East St. Louis cost from $100,000 to $150,000. The expenditure of this money in erecting said shops at DuQuoin, would have given employment to many laborers, and the shops when erected there, would have been subject to taxation and increased the revenue of Perry county, and of Du Quoin, and the school district. If these shops had been erected at DuQuoin it would have given a market for the coal there, and the hands employed in said shops would have caused a greater consumption of food, and thereby have afforded a ready market for the products of the farms and orchards. The location of the machine shops there was an inducement to the yoters, and one of the considerations why the people of the county voted in faver of the proposition. The county court had no power to issue these bonds for the reason that the machine shops of the railroad company were not located at DuQuoin. After the adoption of the present constitution the county had no power whatever to issue

the bonds unless the conditions of the votes cast at the election on July 3rd, 1869, had been complied with. No subscription could be made except on the same terms and conditions specified in the vote of the people at said election.

The Supreme Court of Illinois, on the 20th, day of January 1888, rendered a decision holding all this series of 100 bonds void. The case is reported in 123rd Vol. of the reports of the Illinois Supreme Court, page 489 to page 495, inclusive, under the style of Onstott vs. The People Ex-rel, Penwarden collector.

The evidence in that case as to the terms and conditions of the vote, and the failure of the railroad company to comply with the same, being the same as the evidence in the case at bar.

In that case Mr. Justice Craig, on page 492,-3, of said Vol. in delivering the unanimous opinion of the Supreme Court of Illinois, as to the validity of said 100 bonds says: "It also appears from the evidence, that the railroad company, never located its machine shops at DuQuoin, but on the other hand it erected its machine shops at East St. Louis, that the cost of the shops erected, amounted to the sum of $1000.000 to $150 000. But disregarding the failure of the company to perform the conditions, upon which the people voted the bonds, on the 5th day of December 1870, the county court of Perry county made an order, directing the judge and clerk of the court, to issue one hundred bonds of $1000 each, to the railroad company, bearing date January 1st, 1871, payable Jan. 1st, 1891, with interest at seven per cent per annum.

"After the adoption of the constitution of 1870, a county had no power to become a stockholder, in any railroad corporation, or make donation to, or loan its credit in aid of such corporation, except when subscriptions had been authorized

under existing laws, by a vote of the people of such county, prior to the adoption of the constitution.

"In the case under consideration, there was a vote of the people of the county before the adoption of the constitution, but the authority conferred upon the court by the vote, was upon condition, that the railroad company should locate its machine shops at DuQuoin. The county had no right to take stock and issue bonds, except upon the terms and conditions specified in the vote of the people."

"**Middleport vs. Aetna, Life Ins. Co.**, 82. Ill. 562, is an authority in point. It is there said: "The obligations assumed under existing laws, cannot, since the adoption of the constitution, be enlarged or materially charged, either by the action of the people of the township, or its corporate authorities. All power is taken away, and the utmost that can be done, is to make and complete the subscription or donation previously voted, under then existing laws, upon the same terms and conditions voted. Subscriptions or donations on other terms, would obviously require new consent on the part of the people of the municipality, which can not be had, for want of power."

"The same rule is announced in People vs. Township of Waynesville, 88th Ill. 469, and Jackson county 92nd Ill. 451. Under the decisions cited, it is manifest, that the county authorities of Perry county, could do no more than carry out the will of the voter, as embodied in the conditions, expressed in the order under which the vote was taken, and any other action taken by the county authorities, could not be obligatory or binding upon the tax payers of the county.

"Here the county authorities were authorized to issue bonds, provided the railway company located its machine shops at DuQuoin. **This however the railway company failed to do, and as it had failed to perform**

the condition, upon which the bonds were to be issued, the county authorities had no power whatever, to issue the bonds. If then the bonds were issued without authority of law, it follows that taxes cannot be levied to pay the interest on the bonds."

I have quoted at length from the case of **Onstott vs. The People Ex-rel Supra** because, as heretofore stated, the facts in that case as to the terms and conditions of the vote, and the failure of the railroad company to comply with them, were precisely the same as in the case at bar; and the Supreme court of Illinois, in that case gave a judicial construction to the separate section of the constitution of Illinois (printed in the foregoing statement of this case,) and believing that the rule therein announced, should be followed by this court, as it is in harmony with recent rulings of this court, relative to municipal bonds (issued by municipalities in Illinois, to railroads, since the adoption of the constitution of July 2nd 1870,) which I will refer to, in a subsequent part of this argument. The rule announced in Onstott vs. The People Ex-rel, **supra** is in harmony with all the decisions of the Supreme Court of Illinois, on that subject, announced since the adoption of the constitution on July 2nd 1870, and has become a rule of property, and the Supreme Court of Illinois, has never rendered any decision in conflict therewith in anyway.

The rule announced by this court in the case of The German's Savings Bank vs. The County of Franklin Illinois (decided in Dec. 1888) and reported in 128th U. S. page 526, is in print here, and although that case was not decided by this court, until about 11 months after the decision of the Supreme Court of Illinois, in Onstott vs. The People exrel, supra, yet this court announce in principle, the same rule announced by the Supreme Court of Illinois, on said separate section of the constitution of Illinois. In that case (The

German's Savings Bank vs. The County of Franklin Illinois, supra,) this court in passing on the validity of bonds, purporting to be issued by Franklin County in the State of Illinois, to a railroad company, after the adoption of the constitution (July 2nd 1870) say: "The constitution of Illinois, which took effect July 2nd 1870, provides as follows: No county, city, town, township or other municipality, shall ever become subscriber to the Capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation. **Provided however,** that the adoption of this article shall not be construed, as effecting the right of any such municipality, to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities, prior to such adoption."

"In the present case, the only vote of the people of the County of Franklin, had prior to July 2nd 1870, authorizing a subscription to the Capital stock of the railroad company, was the vote of September 11th 1869.

"By section 7, of the act of April 16th. then in force, (said section is printed in the foregoing statement of this case) the county had the right, in voting for subscription, to prescribe the conditions upon which the subscription should be made, and that section declared that such subscription should not be valid and binding, until such conditions precedent, should have been complied with. Under such circumstances, any condition imposed by the vote, as a condition precedent to the issuing of the bonds in payment of the subscription, was a part of the vote, and a part of the authority for the subscription, within the meaning of the proviso, to the article of the constitution above cited. So also any condition prescribed by the vote, as a condition precedent upon which the bonds should be issued, must have been complied with, in order to make the bonds valid and binding."

In the same case this court further say: "The evident purpose of Section 7, of the act of April 16th 1869, was to prevent the issue of bonds, in payment of subscriptions, to railroad companies, until the conditions imposed by the vote as conditions precedent, had been complied with; and to declare that the bonds if issued in violation of such conditions precedent, should not be valid and binding."

And in the same case this court further say: "The rulings in the **Town of Eagle vs.** Kohn, (84th Ill. 292) was followed by the Supreme Court of Illinois, in Richeson vs. People (115 Ill. 450) in January 1886, and was applied by that court to the bonds issued November 13th 1877, by the County of Franklin, to the same railroad company, under the act of February 22nd 1861, purporting to have been issued, in pursuance of the same vote of September 11th 1869, as in the present case.

"The court referring to its decision in Town of Eagle vs. Kohn, made at September Term 1876, said, (p. 460). "'We there held, that bonds in the hands of innocent purchasers, were not valid where the conditions upon which the subscription was made, have not been complied with. The language is plain and explicit, and unless it should be arbitrarily disregarded, we perceive no ground upon which an innocent holder can evade its provisions." This view was held, as the court said, because when the vote was taken, the 7th, section of the act of April 16th, 1869, was in force."'

There is no recital in any of said bonds in anyway, showing that the terms and conditions of the vote had been complied with in anyway, nor is there any reference thereto in anyway. Neither the registration, nor the certificate of registry nor the certificate of the county judge to have said bonds registered, cover or certifies any facts as to a compliance with the conditions prescribed in the vote, on which alone the bonds were to be issued.

"The Statute does not require, that the Auditor shall determine or certyfy, that the bonds have been regularly or legally issued."

German's Savings Bank, vs. The County of Franklin, Supra, and authorities there cited.

I earnestly insist, that the rule announced by this court in the case last above cited, is decisive of this case, and that it has become a rule of property in Illinois.

But again, as the burden of proof was on the plaintiff in this case, to show that the issue of said bonds was authorized by a vote of the people, prior to July 2nd 1870, and as the election held July 3rd 1869, on the question of subscription, was a special election, there is no presumption that any notice was given of said election, and it devolved on plaintiff to show, that there was proper notices given of said election; and having failed to do so, the bonds were void on that account.

People vs. Jackson County, 92nd Ill. 451, and authorities there cited.

Under the rule announced in that case, it also devolved on plaintiff to show, that all terms and conditions of said vote, had been complied with, and having failed to do so, the bonds should be held void.

The case of Richeson vs. The People ex-rel., 115th Ill. 450, is decisive. And under the rule announced by this court in that case the 100 bonds are absolutely void, even in the hands of an innocent holder.

In that case the county of Franklin submitted a proposition to the peope to take stock in a railroad company. The election was on September 11th 1869, and the proposition voted on provided that no stock should be subscribed or bonds issued unless the railroad was commenced in said county within nine months from the date of said election (September 11,

1869) and completed through said county by first day of June, 1872. The railroad was not commenced in said county until the year 1877, nor completed through said county until the year 1879. In November, 1877, the county officers of Franklin County issued to the railroad company in payment of subscriptions a large amount of interest bearing bonds.

The Supreme Court of Illinois in passing on the validity of said bonds in that case on pages 459 and 460,-1 say: "The county authorities of Franklin County did not observe the plain duty which had been imposed upon them and make the subscription conditional as they had been authorized to do by the vote of the people of the county at the election held on the 11th day of September, 1869. * * The vote of the people of the county which alone authorized the subscription and issue of the bonds, as was said before required, the railroad company as a condition upon which the county should be bound, that the railroad should be completed through the county by the first day of June 1872. When, therefore, the time for the completion of the road expired, it not having been built through the county, the authority of the county authorities to take stock terminated. * * * We are fully satisfied that the action of the Board of Supervisors, in 1877 in issuing the bonds was unauthorized, and that **the bonds were issued without authority of law.**" The order of the County Court submitting the proposition to take stock, and ordering the election on July 3, 1869, referr having been made on May 24, 1869, and the vote on the proposition, with the conditions, having been had on July 3, 1869, and the act of April 16, 1869, referred to in **Richeson vs. The People Supra,** having become a law, from and after its approval (April 16, 1869), was in force prior to said order for the election, and prior to the election, and the bonds fall directly within its provisions.

The meaning of this act is plain. It was intended to protect the tax payers against payment of bonds or interest thereon issued to railroad companies, where the conditions had not been complied with. Prior to this act the law had been settled that in the absence of legislation to the contrary, bonds purporting on their face to have been issued by the authorities of a county in pursuance of law, operated in the hands of a bona fide purchaser, and no tax can be collected on them to pay interest, as it is not claimed that the conditions on which they were voted have been complied with. To hold otherwise would be to nullify said act which was passed for the very purpose of providing safeguards to municipalities in case like the case at bar. These bonds having been issued since the adoption of the present constitution, and there being no recitals in them that they are issued in accordance with the proviso of the separate section of the constitution, or in accordance with a vote of the people, they have no presumption or intendment in their favor; and they labor under disabilities of a constitutional denunciation against them, and like other dishonored paper put upon the market, the public are put upon due inquiry into everything connected with their issuance, validity and history.

The Supreme Court of Illinois in People vs. Jackson County, 92nd, Ill. 442, say: "This prohibition of the new constitution is general and positive in fall cases except those saved by the proviso; and it is a well recognized rule that a party claiming a right saved by a proviso in a statute must show that the rights so claimed are clearly within the proviso; and until this is done the presumption is that it is embraced within the enacting clause." "Officers representing a county can exercise only such powers in its name and on its behalf, as are expressly conferred or as are incidental and necessary to carry into effect the objects of the incorporation."

Springfield vs. Edwards, 84th Ill., 634. "Much less can any power be exercised or act done which are forbidden by statute." Dillon on Municipal Corporations, Sections 55, and authorities there cited.

These bonds wear the badge of constitutional condemnation. Every intendment and presumption of law is against them, and those asserting the validity of these bonds must meet and avoid a prohibition of the constitution against them, which in general terms denies all power on the part of the county to issue them, with a saving proviso that if authorized under existing laws by a vote of the people of the county prior to the adoption of the constitution, they are valid. Can this inflexible prerequisite of the constitution be met and satisfied by the same measure of evidence that would have been sufficent to uphold such bonds prior to its adoption? Can the essential facts which save such bonds from the general prohibition of the constitution be assumed until there is full proof that they do actually exist?

The case of Town of Prairie Grove et al, vs. Lloyd et al, 97th Ill., 179, is in point here. In that case the Supreme Court of Illinois, say: "Where municipal bonds have been issued in aid of railway corporations, since the constitution of 1870 went into effect the burden of showing they were issued in compliance with a vote of the people of the municipality, in pursuance of some law authorizing the same, rests upon those affirming their validity." And in the same case the court also say: **"Such bonds are prima facia invalid."** These bonds were issued long after the adoption of the constitution of 1870, and there is not one word of evidence which even tends to show that any of them were issued in compliance with a vote of the people of Perry County, but on the other hand the evidence shows beyond all question that their issue was not authorized by a vote of the people of Perry County, but that their issue was in direct conflict with the vote cast at the election on July 3rd, 1869.

Statement of the case for Defendent in Error, as to the 100 bonds purporting to be issued by Perry County, to the Chester and Tamaroa, Coal and Railroad Company.

The county records read in evidence in this case, show that on the 18th, of January 1870, the County Court of Perry County made an order, submitting to the voters a proposition to be voted on, at an election to be held on the 19th of February 1870, to subscribe $100.000 to the Capital stock of the Chester and Tamaroa, **Coal** and Railroad Company.

Said order provides that no stock be subscribed to said Coal and Railroad Company unless, nine hundred and eighty four (984) legal voters of said county shall have voted for the same at said election. (See pages 56-,-7 and 58 of record). This order also provides, that the subscription be paid in county bonds, of not less than $100 nor more than $1000 each, payable at any time within 20 years from their date at the option of the County Court, bearing interest at 7 per cent per annum, from their date. The bonds to registered and paid as provided for, in act of April 16th 1869, but no bonds be registered or paid except in the following manner to-wit: $50.000 of bonds be issued to said company when road and cars for passengers &c., shall have run thereon to Pinckneyville, in said county, and Depot &c., established there. This order also provides, that the other $50.000 shall be issued when said road shall be completed through the county, and thence to the terminus of said road and cars shall have run thereon.

On the 8th of March, 1870, the county court of said county made another order reciting said order made January 1870, calling said election to be held February 19th 1870, and declaring that said election was held in said county Feb. 19th 1870, and that said proposition to take stock in said Coal and Railroad Company carried at said election.

This order then states: "It is ordered by the court in pursuance of said order of court, and the election held there under, and the statute in such cases made and provided that the county subscribe one hundred thousand $100.000) to the Capital stock of the Chester and Tamaroa Coal and Railroad Company, to be paid in the bonds of said county, to be issued in accordance with said order of court under which said election was held, and to be registered and paid as provided by an act of the General Assembly of the State of Illinois, in force February 16, 1869, entitled." An Act to fund and provide for paying the railroad debts of counties, townships, cities and towns." And it is further ordered by said court that the judge of this court subscribe said stock on the books of said company, and that the same be attested by the clerk of this court under the seal of this court." (See page 56,-7,-8,-9,-60,-1,-2,-3 and 64 of record.

On the 10th of November 1871, said County Court made another order reciting said order made January 18th 1870, also reciting said order of March 8, 1870, and reciting said election held on February 19, 1870. Said order of November 10, 1871, order county judge and county clerk to sign and deliver to said company, or their agent or attorney, 50 bonds of said county for $1.000 each, to bear date July 1st, 1871, to draw interest at 7 per cent, per annum from their date, payable semi-annually, and that said bonds be registered and paid, etc,, (See pages 70,-1,-2 of record.)

On December 6, 1871, said court made another order directing county judge and county clerk to "execute and deliver to the Chester and Tamaroa Coal and Railroad Company, their agent or attorney, fifty (50) bonds of this county, heretofore authorized by a vote of the people, at an election held on the 19th day of February, 1870. Said bonds to be of the sum of one thousand dollars ($1.000) each, and to be dated January 1st, 1872, and to be redeemable within

twenty (20) years at the option of the County Court, and to bear interest from their date at the rate of seven (7) per cent per annum, payable semi-annally. * * * And on the first days of January and July each year." [See pages 61,-2,-3 and 64 of record].

Said order also provides that said $50,000 of county bonds be in full payment for $100,000 of stock "heretofor" by "this court" subscribed to said Chester and Tamaroa **Coal** and Railroad Company, the first instalment of $50,000 of of the bonds of "this county" having been heretofore issued bearing date January 1st 1871. [See pages 65,-6,-7, 8 and 69 of record].

The register of said bonds in the Auditor's office read in evedence in this case, shows that said bonds were issued to said company, and that they were issued under the act approved **November 6th 1849**, and that the date of the vote purporting to authorize their issue was "**February 19th 1870.**"

The evidence shows conclusively that each of said bonds were issued under said act approved November 6, 1849, and the only vote relative to their issue is the vote cast at said election held on **the 19th day of February 1870.**

The proposition for said county to subscribe stock and issue bonds to said Coal and Railroad Company was voted on by the voters of the county at an election held on the 19th day of February, 1870. And the evidence shows this conclusively. [See pages 227 and 228 of record.]

The last general election held for county officers in Perry County **previous** to the 19th day February, 1870, was held on the 2nd day of November, 1869. There is no question about this.

The poll books of the general election for county officers held in Perry County on the 2nd day of November, 1869,

were read in evidence in this case. These poll books were positiyely and clearly identified by the County Clerk and show beyond all question that at said election **two thousand and twenty four (2024) votes were thrown,** (See pages 227 and 228 of record).

There were elected at this election a county judge, two associate justices, a county clerk, county treasurer, county surveyor, county seperintendent of schools, and justices of the peace and constables.

There is no question about this. These poll books give the name of each voter, with the number of his vote, and the tally of the judges and clerks of said election, and signed by said judges and clerks, and the affidayits of the judges and clerks are attached to said poll books. There can be no qvestion about the identity of these poll books. Nor can there be any question as to the number of votes thrown at said election. The poll books of the said special election held in said county on the proposition to issue said 100 bonds to said Company and were fully identified and show conclusively that at the last named election only 986 votes were thrown in favor of said county issuing said bonds and 91 votes were thrown in favor of issuing them; hence the proposition to issue the bonds lacked at least 27 votes of receiving the requisite majority. (See page 227 and 228,-9 of record).

The following is a true copy of bond No. 48 of said series of 100 bonds purporting to be issued by said county to said company, and is an exact copy of each of the other bonds of said series except their nnmbers and dates. 50 of said bonds being dated subsequent thereto, to-wit: Jan. 1st 1872. (See pages 78,-79 and 80 of record).

(COPY OF BOND.)

"UNITED STATES OF AMERICA.

"No. 48. "STATE OF ILLINOIS,

"COUNTY OF PERRY. [1.000]

"Registered in the Office of Auditor of Public Accounts of the State of Illinois.

Principal and interest collected and paid by the Treasurer of the State of Illinois.

"RAILROAD BOND.

"Know all men by these presents, that the County of Perry, State of Illinois, is indebted to the Chester and Tamaroa Coal and Railroad Company, or bearer in the sum of one thousand dollars, lawful money of the United States, with interest from date at the rate of seven per cent per annum, payable semi-annually on the first days of January and July of each year, at the American Exchange National Bank, in the City of New York, on the presentation and surrender of the respective interest coupons hereto annexed. The principal of this bond shall be due and payable at any time within twenty years from date hereof, at the option of said county, at said bank in New York City. This bond is one of a series of bonds, issued by the County of Perry, in payment of one hundred thousand dollars of the Capital stock of the Chester and Tamaroa Coal and Railroad Company in pursuance of an election held by the legal voters of Perry County, Illinois, on the 15th day of February, 1870, and by virtue of the provisions of the act of the General Assembly of the State of Illinois, "An Act supplemental to an act entitled," "An Act to provide for a general system of railroad incorporations, approved November 6, 1849."

"And for the payment of said sum of money, and accruing interest thereon, and in the manner aforesaid, the faith of the County of Perry, State of Illinois, is hereby irrevocably pledged, as also its property, revenue and resources."

"In testimony whereof, the County Court of said County of Perry, have caused these presents to be signed by the County Judge and the Clerk of
[SEAL.] the County Court of said County, and to be sealed with the seal of said Court at Pinckneyville, in said County, on this the first day of July, A. D. 1871. CHARLES E. B. WINTHROP,
"J. CARROLL HARRIS, County Judge."
County Clerk.
"Endorsed: (See pages 78 and 79 of record.)

"AUDITOR'S OFFICE ILLINOIS,
Springfield, Nov. 17, 1871.

"I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

In testimony whereof, I have hereunto subscribed
[SEAL.] my name and affixed the seal of my office, the day and year aforesaid,
C. E. LIPPINCOTT,
[See pages 79 and 80 of record.] Auditor P. A."

The validity of said last named series of bonds purporting to be issued by said County to said Coal and Railroad Company, was passed upon by the Supreme Court of Illinois, in January 1888, in the case of Onstott vs. The People Ex-rel. reported in 123rd Vol. of the reports of Ill. Supreme Court, on page 489 to 495, and in that case the Supreme Court of Illinois, unanimously held all of said last named series of bonds void, because their issue was not authorized by a vote of the

people of Perry County, as required by the Act of Nov. 6th 1849, heretofore printed (in the first statement of this case) and recited on the face of said bonds as the law under which they were issued.

Brief for Defendent in Error relative to the 100 bonds purporting to be issued by Perry county, to The Chester and Tamaroa, Coal and Railroad Company.

FIRST.

The evidence in the case, and the recitals on the face of said last named series of bonds, show beyond all question, that they were issued under the act of Nov. 6th 1849, [heretofore printed] and the election, claimed to have authorized their issue, was held February 19th 1870, and said last named act prohibited the issue of said bonds, unless a majority of the qualified voters of the county, [taking as a standard the number of votes thrown at the last general election previous thereto, for county officers] shall vote for the same. And as the evidence shows, that the last general election held for County officers, in Perry county (previous to the election held in said county on the 19th day of Feb. 1870, on the proposition, for said county to take stock in said company) was held on the 2nd day of November 1869, and at said election (held November 2nd 1869) **two thousand** and twenty-four (2024) votes were thrown, and at the election held in said county on February 19th 1870, on the proposition, for said county to subscribe stock and issue bonds, only nine hundred and eighty-six (986) votes were thrown in favor of said proposition, for said county to take stock in, and issue bonds to said Coal and Railroad Company, and said proposition lacked at least twenty-seven (27) votes of receiving a majority of the qualified voters of said county, as required by the aforesaid act of Nov. 6th 1849; and consequently, said

last named 100 bonds were issued without any authority of law, and having been issued since the adoption of the separate section of the constitution (July 2nd 1870 heretofore printed,) their issue was not authorized by a vote of the people as required by said section, but their issue was prohibited by said section, and they are absolutely void.

Onstott vs. The People Ex-rel 123rd Ill. 489, and authorities there cited.

The German's Savings Bank vs. The County of Franklin Illinois, 128th U S. 526, and authorities there cited.

Marsh vs. Fulton County (in Illinois) 10th Wallace 676, and authorities there cited.

Floyd acceptances Ibid 173.

Piatt vs. The People Ex-rel 22th Ill, 67.

People ex-rel, Ruyle 91st Ill. 528.

People vs. Hilliard 29th Ill. 425.

Marshall County vs. Cook, 38th Ill 45, and authorities there cited.

Chestnutwood vs. Hood, 68th Ill. 137.

People vs. Waint, 48th Ill. 264.

Lippencot vs. Town of Pana, 92nd Ill. 33 and authorities there cited.

Schuyler County ys. Farwell 25 Ill. 181.

People vs. County of Tazwell, 22nd Ill. 154.

SECOND.

The 100 bonds, purporting to be issued by Perry county to the Chester and Tamaroa, Coal and Railroad Company, show by recitals on their face, that they were issued to said company by said county, in payment of $100.000 of the Capital stock of said company, and as one of the main objects

of said company, was to engage in manufacturing, and in other busines which was not for a corporate purpose, and as section five (5) of Article (9), of the constitution of Illinois, of 1848, was in force in Illinois, from the time of the adoption of said constitution, [in 1818], until the adoption of the new constitution of Illinois (July 2nd 1870), and as said section 5, was in force at the time of the election, held Feb. 19th 1870, on the question of said subscription, and as said section [5], prohibited counties in Illinois, from taking stock in a manufacturing company, or loaning its credit for that purpose, said last named 100 bonds, were issued in direct conflict with the constitution of Illinois in force in Illinois from the year 1848, until July 2nd 1870; and as said section 5, prohibited counties in Illinois, from taking stock, or loaning their credit to a manufacturing company, there could be no law in Illinis, authorizing Perry county to take stock in, or issue bonds to said company because, any law attempting to give Perry county such power, would have been violation of said section 5 of the constitution of 1848, and consequently could not have been in force in Illinois, as no law can be in force, which contravenes the provisions of the constitution of the state; consequently said last named 100 bonds were issued without any authority of law and are void.

Section 5, of article 9, of the constitution of Illinois of 1848, (heretofore printed) R. S. of Ill. of 1874, page 53.

The People ex-rel City of Rockford vs. Maynard 14th Ill. 421.

Hills vs. Chicago, 60th Ill. 92

Ottis and Major vs. Chicago 62nd Ill. 299.

Chance vs. Marion County 64th Ill. 66.

Devine vs. Board of Coms. of Cook County 84th Ill. 590.

Johnson vs Stark County 24th Ill. 75.

Trustees etc., vs. The People 63rd Ill. 301.

Howard et al. vs. St. Clair Drainage Co. 51st Ill. 133.

Mather vs. City of Ottawa, 114th Ill. 664,-5.

Sleight et al. vs. The People 74th jll. 48,-9.

Coms. of Highways vs. Newel et al, 80th Ill 587.

Tencyck vs. The Canal Co. 3rd Harris 200.

Taylor vs. Thompson 42nd Ill. and authorities there cited.

Cooley on taxation page 209.

Soper vs. Henry County 26th Iowa 264.

Dillon on Municipal corporations, section 107.

Cooper vs. Manufacturing Co. 1st Sneed Tenn. 698.

Clark vs. Dennis 19th Iowa 199.

Cooley's Const. Limitations 212.

Carroll vs. City of East St. Louis, 67th Ill. 572,-3.

Second Kent * 282.

Fourth Kent * 20,-1.

Bissel vs. Kankakee, 249.

English vs. People 96th Ill. 569.

Cooley's Const. Limitations (1st ed) 518.

Cooley on Taxation page 78, and authorities there cited.

Schuyler county ys. Farwell 25th Ill. 181.

Lippencot vs. Town of Pana, 92nd Ill. 345.

School Directors vs. Faleman 76th Ill. 189.

Taylor Dist. vs. Township of Wayne 25 Iowa 447.

Elmwood vs. Marcy 20th Ill. 289.

Herman's law of Estopel section 224.

Bridgelow on Estopel, pages 508 and 475 to 490.

Marsh vs. Fulton county 10th Wallace, 676.

THIRD.

The 100 bonds purporting to be issued by Perry county, to the Chester and Tamaroa, Coal and Railroad Company were not authorized by a vote of the people, as required by the separate section of the constitution of Illinois, of 1870, [heretofore printed.] The evidence in this [heretofore referred to] shows beyond all question, that the vote cast in said county to issue said bonds, was the vote at the election held February 19th 1870, and that the vote then cast on the proposition for said county to issue said bonds, was the only vote cast on said proposition, and that said proposition lacked 27 votes, of receiving a majority of the qualified voters of said county.

Hence the issue of said bonds, was prohibited by said separate section of the constitution of Illinois, and said bonds are void.

Separate section of constitution of Illinois, of 1870 heretofore printed.

Wright vs. Bishop 88th Ill. 302.

Richeson vs. People Ex-rel 115th Ill. 420.

Onstott vs. People ex-rel 123rd Ill. 489.

The German's Savings Bank vs. The County of Franklin 128th U. S. 526.

I also refer to the other authorities referred to, relative to said last named 100 bonds.

Argument of Defendant in Error, relative to the 100 bonds purporting to be issued by Perry County, to The Chester and Tamaroa Coal and Railroad Company.

FIRST.

The evidence shows beyond all question, that said 100 bonds were issued under said act of November 6th 1849, and the election claimed to authorize their issue, was held Feb. 19th 1870.

The 4th section of said act of 1849 says: No subscription shall be made or purchase, or bonds issued by any county or city, under the provisions of this act, whereby any debt shall be created by said judges of the county court, or by the Common Council of any city to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election, previous to the vote had upon the question of subscription under this act, for county officers) shall vote for the same. This section also provides for ballots at such elections, and proyides that they shall be counted and returned by the judges and clerks of elections as in other cases, and also proyides, "If a majority of the voters of said county or city, **assuming the standard aforesaid**, shall be in favor of the same, such authorized subscription or purchase or any part thereof shall then be made by said judges or Common Council.

The poll books of the general election for county officers held in Perry county on Noyember 2nd, 1869, are in evidence in this case and show beyond all question, that at said election **Two Thousand and twenty-four (2024) votes were trown.**

There were elected at said election a County Judge, two associate Justices, a County Clerk, County Treasurer, County Superintendent of Schools, and Justices of the Peace.

The Supreme Court of Illinois in Piatt vs. The People Ex-rel 29th Ill. 67,-8,-9, hold, that poll books of an election

are evidence of the number of votes thrown at the election. The Supreme Court of Illinois in Chestnutwood et al. vs. Hood et al. 68th Ill. 138, say "A majority of those voting on a particular question would be determined by the ballots; but a majority of those voting at the election, would be determined by the poll books showing the names and number of those voting.

That said election held November 2nd 1869, was the last general election held in said county for county officers, previous to the vote on the proposition to subscribe the stock and issue the bonds (February 19th 1870), is beyond all question.

The evidence also shows that there was no election held in DuQuoin Precinct, in said county on the 19th of Feb. 1870. The poll books of the said election held February 19th 1870, show that only one thousand and seventy-seven (1077) votes were thrown at said election, and the returns of the judges and clerks of said last named election show that only nine hundred and eighty-six (986) votes were cast at said election in favor of the proposition, for said county to subscribe stock and issue bonds, to the Chester and Tamaroa Coal and Railroad Company, and that ninety one (91) votes were cast at said election, against said proposition.

There having been 2024 votes thrown at said general election for County officers held Nov. 2nd 1869, and only 986 votes cast in favor of the county subscribing the stock and issuing the bonds at said election held February 19th 1870, it is evident that a majority of the qualified voters of Perry County did not vote in favor of the County making the subscription and issuing the bonds, taking as a standard the number of votes thrown at said general election for county officers in said County on November 2nd 1869. Perry County had

no power to issue the bonds, unless a majority of the qualified voters thereof, **(which would have been 1013) had voted in favor of the same, at the election held February 19th 1870, and only** 986, having **[as heretofore shown] been cast in favor of issuing said bonds, it is evident that the proposition for Perry County to issue said bonds, lacked at least twenty seven [27] votes of receiving a majority of the qualified voters of Perry County, taking the standard fixed by the Act of November 6th 1849, which was the number of votes thrown at said election held in said County on November 2nd 1869.** There can be no question about this.

These bonds having been issued under said act of 1849, the 4th section of which, positively prohibited the issue of any bonds under that act, unless a majority of the qualified voters of the county should vote for the same, taking the standard aforesaid, and the evidence shows beyond all question, that the proposition did not receive the requisite majority, certainly the bonds were issued without any authority of law, and are void.

The Supreme Court of Illinois passed upon the validity of said 100 bonds in January 1888, in the case of Onstott ys. The Peopld Ex-rel, 123rd Ill. 489, on the same state of facts as this case, and hold that they were issued without authority of law and were void. In that case on pages 494 and 495 the Supreme Court of Illinois, by Justice Craig say: "On the 19th day of January 1870, the County Court of Perry County submitted the proposition to the voters of the County to subscribe $100.000 to the Capital stock of the Chester and Tamaroa Coal and Railroad Company. The proposition to be voted on, on the 19th of February 1870. Under this order an election was held in all the precincts in Perry county, except DuQuion Precinct.

"It also appears from the poll books, that at the last general election next preceding the election of 19th day of Feb. 1870, to-wit: the general election on the 2nd day of November 1869, at which county officers of Perry county were elected; 2024 votes were thrown.

"It was therefore required by the act of 1849, that the proposition should receive 1013 votes, before it could be held to have been adopted by the voters of the county. By the terms of the 4th section of the act under which the election was held, the county authorities were not empowered to issue the bonds, unless a majority of the qualified voters of the county voted in favor of issuing the bonds, taking as a standard the number of votes cast at the last general election held in the county next before this vote was had. This was not done. In Marshall county vs. Cook 38th Ill. 45, where an election had been held, and bonds issued under the act of 1849, the bonds were held to be invalid, because the election was called by the county court, when it should have been called by the Board of Supervisors. In Williams vs. Town of Roberts 88th Ill. 20; The Marshall County case is cited with approval and it is there said: "This court has repeatedly announced the doctrine, that where a municipality is empowered to subscribe to the Capital stock of a Railroad Company, and issue its bonds in payment of the subscription but it is also required that, there shall first be an affirmative vote of a majority of the electors of the municipality to that effect. No power exists to make the subscription and issue the bonds, until after such vote shall have been obtained at an election held for that purpose, called by the authority prescribed by the law, and upon such notice of the time and place of holding the election as the law shall direct." It will not be necessary to multiply authorities on the question. We are of the opinion, as the proposition to issue the bonds did not receive the vote required by the statute, the county

court had no right to issue the bonds, and the bonds being illegal, taxes could not properly be levied and collected to pay interest thereon."

I have quoted at length from the case of Onstott vs. The People Ex-rel, Supra, because it is a judicial construction by the Supreme Court of Illinois, upon said act of Nov. 6, 1849, and decides in the most positive language that said bonds are void, and believing that the rule therein announced should be followed by this court, as the Supreme Court of Illinois has never rendered any decision in conflict with the rule therein announced, and the rule therein announced has been so thoroughly settled as the law of Illinois for so many years, that it has become a rule of property in Illinois.

The rulings of the Supreme Court of Illinois in Onstott vs. The People Ex-rel, Supra, are in perfect harmony with the rulings of this court in the Floyd acceptances 10th Wallace 173, and in the leading case of Marsh vs Fulton County 10th Wallace 676, and authorities there cited.

It is also in perfect harmony with the rule announced by the Supreme Court of Illinois, in the case of the People vs. the county of Tazwell, decided by said Court at its April Term 1859, and reported in 22nd Ill. page 154, and with the case of Marshall county vs. Cook 38th Ill. 48, **Supra.**

The last named case was decided at April Term 1865, by the Supreme Court of Illinois, more than five years before any of said bonds were issued, and the case at bar falls directly within the rule therein announced in case of People vs. County of Tazwell Supra.

This court in the case of the German's Savings Bank vs. The County of Franklin (in Illinois) 128th U. S. 526, **Supra,** referring to a decision of the Supreme Court of Illinois, say: "This court must recognize this decision (the decision then under consideration) of the Supreme Court

of Illinois, as an authoritative construction of the Statute made before the bonds were issued and to be followed by this court. **(Douglas vs. County of Pike 101st U. S. 104.** Burgess vs. Seligman 107th U. S. 20. Green County vs. Conness 109th U. S. 104. Anderson vs. Santa Anna 116, U. S. 356,) in the first of these cases it was said: "After a Statute has been settled by judicial construction, the construction becomes, so far as contracts rights acquired under it are concerned, as much a part of the Statute as the text itself."

The Supreme Court of Illinois in the case of People vs. County of Tazwell supra, (22nd Ill. 154) construing section 4 of said act of November 6th 1849, say: The words, **such authorized subscription" necessarily refers to the authority conferred by a majority of the voters ascertained by the election provided for in this section. The vote resulting in favor of such subscription or purchase is necessary to authorize the county judges or City Council to act, and is a limitation on the discretionary power conferred by the first section; as without such vote they could not subscribe, whatever might be the desire of the citizens of the county."**

This case was decided (at April term 1859), by the Supreme Court of Illinois, more than ten (10) years before any of said last named series of bonds were issued, and I insist that the rule therein announced must govern in this case. But it may be claimed that the decisions of the Supreme Court of Illinois, should not be followed by this court in this case, that the plaintiff being a citizen of the State of Ohio, has right to sue Perry County in the U. S. Circuit Court, and the courts of the U. S. not being bound to follow the decisions of the Supreme Court of Illinois, the plaintiff has a right to recover a judgment against Perry County, and collect it for interest on these bonds.

Now here are 100 bonds for $1000 each purporting to be issued by Perry County to said Company. Suppose all of said bonds are due, and "A," who is a citizen of St. Louis, in the State of Missouri, owns 50 of them, and "B," who is a citizen of East St. Louis, in the State of Illinois, owns the other 50 of said bonds; The Mississippi River divides the two cities, one being on the West bank of said river and the other on its East bank. As a matter of course "B" could not maintain an action on his bonds in the U. S. courts because he is a citizen of Illinois, but if he sued Perry County on his bonds, would have to bring suit in the Circuit Court of Perry County, and could not by any means have the case passed upon by any U. S. Court, but the Supreme Court of Illinois having passed upon the validity of said bonds and held them void, it is evident that he could not recover any judgment on his bonds, and that he could not collect any of them in anyway, but that they would be worthless.

But on the other hand "A," being a citizen of Missouri, could sue Perry County on his 50 bonds in the U. S. Court at Springfield Illinois, and if the courts of the U. S. should not follow these decisions of the Supreme Court of Illinois, but should render a judgment in favor of "A" against said county for the amount of his 50 bonds "A" could collect the same, because he happened to be a citizen of Missouri instead of Illinois, his rights to recover being dependent on the place where he is a citizen. Certainly such is not the spirit of our laws. Is there any just reason why a citizen of Illinois, should not in justice have as much right to recover a judgment on these bonds, as a citizen of any other state?

If this court does not follow the decisions of the Supreme Court of Illinois, in construing the constitution and laws of Illinois, I most respectfully submit that it would involve the consequences of this court setting up a policy in Illinois

contrary to its constitution and laws as expounded by its own Supreme court, and would be encroaching upon the rights of the state, and the powers of its tribunals, and would result in the destruction of the rights of the state to control and regulate its government, and would destroy municipal government in Illinois, and result in the centralization of power in the courts of the United States.

Every department of the State of Illinois, has recognized the invalidity of all these bonds, ever since they were declared void by the Supreme Court of Illinois, in Onstott vs. The People Ex-rel supra, and no taxes have been levied since then, to pay interest on them.

Hence this suit was brought in the Circuit Court of the U. S. for the purpose of evading the rule announced by the Supreme Court of Illinois, holding them void in Onstott vs. The People Ex-rel **Supra**.

But again, if this court should construe the constitution and laws of Illinois, different from the Supreme Court of Illinois, what certainty would there be as to what are, and what are not the laws of Illinois?

What security would there be as to rights under the laws of Illinois? Would there by any repose? **"Certainty of law is the mother of repose."**

These bonds were not only issued without any authority of law, **but were issued in direct conflict with** the act of November 6th 1849, the very law which they show upon their face they were issued under, and which is claimed to authorize their issue.

The evidence in this case shows beyond all question that the issue of these bonds was **positively prohibited** by the 4th section of the law of 1849. Certainly that section means just what it says, and must be strictly construed.

Now does this imperative prerequisite of that statute mean nothing? Can it be disregarded by the county officers with impunity, and debts created and burdens imposed and the people bound to pay them, where the same was clearly and emphatically prohibited by a positive statute of the state?

Can the County Court contract debts and make them valid and binding where they were prohibited by law? Can they repudiate and annul a positive statute of the state and be a law unto themselves? Can they, by acting in violation of the law of the state, create a power which never existed, and thereby create valid and binding obligations against the county, which the law positively prohibited, and compel the tax payers to pay them? If so, what protection do the laws of Illinois give to the people?

"The servant is not greater than his master." The County court of Perry county claimed that they had the right to issue these bonds, and by making false recitals in the county records, can they thereby fasten this debt on the county, and then take the property of the tax payers of Perry county to pay interest and principal?

The Supreme court of Illinois, in case of Marshall county vs. Cook, 38 Ill. 45, held that bonds issued by that county under the law of November 6th, 1849, were void because the county was not authorized by a vote of the people to issue them as required by said law, and rendered more than five years before these bonds were issued, Both the reasoning and principle announced in that case were fully approved by the Supreme Court of Illinois in case of Williams vs. Town of Roberts 88th Ill. 20. Chief Justice Schofield in deliyering the unanimous opinion of the Supreme court of Illinois in that case said: "This court has repeatedly announced the doctrine that where a municipality is empowered to subscribe to the Capital stock of a railroad company and issue its bonds

in payment of the subscription, but it is also required that there shall first be an affirmative vote of a majority of the electors of the municipality to that effect; no power exists to make the subscription and issue the bonds until after such vote shall have been obtained, at an election held for that purpose, called by the authority prescribed by the law, and upon such notice of the time and place of holding the election as the law shall direct; and that whoever deals in municipal bonds is chargable with knowledge whether these precedent conditions to the exercise of the power of making the subscription and issuing the bonds have been complied with." I most respectfully submit that to hold these bonds valid would be to violate a positive requirement of the statute. It would be arbitrarily disregarding the legislative will, declared for the protection of the people who are taxed to pay the interest on these bonds. To hold bonds valid which were issued without authority of law, is to say that the will, of the legislature shall not be binding, and that acts of county officers in issuing bonds in violation of a positive statute shall be as valid as if done in strict conformity with the laws of the state. It is a well setted rule of law that all public officers must act within the scope of their authority or their acts will be void. And all the power in such cases is derived solely from the law. The issuing of interest bearing county bonds involves the levying and collection of the taxes for the payment of the interest, and to that extent deprives the taxpayer of his property, and that cannot be done except by authority of law. The law of 1849 not only required that an election should be held resulting in favor of issuing the bonds to confer the power, but expressly prohibated the county officers from issuing the bonds unless authorized so to do by a vote of the people as prescribed by said act. But again it may be claimed, that as the proposition voted February 19, 1870 received more than one half (1-2) as many votes as were cast for the

candidates for some of the county officers at the election held November 2, 1869; that the proposition received the majority required by the statute. Such is not the law.

The case of Chestnutwood et al. vs. Hood et al. 68th Ill. 137, is in point here. In that case the county of Randolph with other municipalities was authorized to subscribe stock and issue bonds to the C. & S. L. Railroad company. Private laws of 1869, Vol. 3. 256. The act provided that no subscription be made or bonds issued unless a majority of the legal voters of the county should vote for the same at an election to be held under the order of the county court. This act also provided that a majority of the legal voters at such election shall be held as a majority of the legal voters of any such county. Under this law the County Court of Randolph county submitted a proposition to the voters to take stock and issue bonds to said railroad company, to be voted on at the general election for county officers, held in Nov. 1869.

At that election 3,210 votes were thrown in Randolph county, and there were cast in favor of the proposition 1,278 votes, and there were cast against said proposition 1,275 votes. After this election the County Court of that county made an order to subscribe the stock and issue the bonds to the railroad company. Chestnutwood and other tax payers filed a bill against Hood, the county judge, and others, to enjoin the issue of the bonds. The bill stated that the number of votes cast at this election in the county in November, 1869, the number cast in favor of the proposition and the number cast against the proposition, and charged that the proposition had not received the requisite majority of votes. In the state Circuit Court a general demur was sustained to this bill, and it was dismissed for want of equity by that court. The complainants prosecuted an appeal to Supreme court of Illinois, that court, in passing on that case, after receiving the law

under which the vote was had, say, on page 137: "The manifest purpose of the legislature in the enactment of these provisions was to protect the taxpayers from the imposition of the proposed burdens, unless a majority of the legal voters of the town, city, county or township, whose subscription or donation is desired, shall authorize them by an affirmativevote, and to provide a reasonable, accurate, and at the same time feasible mode by which to ascertain such majority. "We think the case is sufficintly analagous, in principle to the case of the People vs. Wiant, 48th Ill. 264, to be governed by the rule there announced. * * * In that case it was said by this court: "It is not the vote cast upon that single question that is to govern, where it occurs at any other election held at the same time, but it must appear that a majority of all the votes cast at that election were in favor of removal."

And in the case of Chestnutwood et al. vs. Hood et al. 68th Ill. page 138, this court further say: "A majority of those voting on a particular question would be determined by the ballots, but a majority of those voting at the election would be determined by the **poll books, showing the names and numbers of those voting.**"

And in the same case, on page 137, this court also say: "It is a well settled rule of construction that statutes extending the powers of corporations or increasing the burdens of taxation must be strictly construed. The wisdom of this rule cannot be questioned. * * * This law must be enforced as it is written. And as it appears by the bill that there were cast in the different precincts of the county, **at the election 3.210 legal votes, and in favor of the subscription only 1.278 votes, those representing the authority of the County had no power to make the subscription, and consequently cannot issue or deliver the bonds of the County for its payment.**"

These bonds having been issued long since the adoption of the Constitution of 1870, and as their issue was not authorized under existing law by a vote of the people prior to the adoption of the Constitution, the County was positively prohibited by the separate section of the Constitution from issuing them. The requisite vote being the charter of the authority for their issue, and the requisite vote not having been cast, the bonds were issued with out authority of law and are void.

While I insist that there never was any legislative authority for Perry County to subscribe stock or issue bonds to the Chester & Tamaroa Coal and Railroad Company (and will discuss that point in a subsequent part of this brief and argument), yet if there was any legislative authority for to do so, that authority was conferred **alone** by the law of 1849. But the evidence in this case shows beyond all question that there was no power to issue the bonds because the requisite number of votes were not cast in favor of the proposition at the election held February 19, 1870; but the evidence shows that on the 8th of March, 1870, the County Court made an order reciting the order made in January, 1870, submitting the proposition to the people, and calling the election to be held February 19, 1870; and reciting that said election was held in said county on the 19th of February 1870, and that at that election a majority of the legal voters of said county, assuming the standard required by law, and the said order of court, taking as a basis the number of votes cast at the (then) last general election for county officers, had voted in favor of said county subscribing stock, etc., to the Chester & Tamaroa **Coal** and Railroad Company.

Now, this is a matter of record in Perry County, and it may be claimed that this order made by the County Court

March 8, 1870, is, and the recitals therein and the recitals in the bonds are evidence that the requisite majority of votes were cast in favor of the proposition at the election on Feb. 19, 1870. But it is not evidence of that fact. The poll books, as we have heretofore stated, were the evidence of the number of votes cast at the election held November 2, 1869.

Yet in the face of all this record the County Court on March 8, 1870, made the order reciting that it appeared from the returns of file in the County Clerk's office that a majority of the voters on the county had voted in favor of the proposition, when these very returns, which are referred to in said order, show beyond all doubt that a majority of the voters of the county had **not** voted in favor of the proposition. This false statement was made by the County court in the very teeth of the records and files of the county.

As the County court (as shows by the evidence) had no power to issue the bonds because they had not been authorized to do so by a vote of the people, could it, by making this false recital in this order of March 8, 1870, create a power which never existed? And by these false statements breatne the breath of legality and life into this $100,000 of interest bearing bonds, and compel the tax payers of Perry county to pay them, when the issue of these bonds was prohibited by the constitution of the state and the law of 1849?

Can the protective provisions of the constitution and the law of 1849 be evaded and rendered useless by false statements entered of record by these county officers?

If so, the power of falsehoods entered on the county records are endowed with a dreadful power and vitality, which repudiate and survive the prohibitions of the constitution and laws of the state, and threaten to become immortal.

"Certainty of law is the mother of repose."

The actual existence of the facts, giving power to the officers

to issue the bonds would have conferred the power, but false recitals did not create the power The constitution and laws cannot be annulled and disregarded in that way, and the property of the tax payers confiscated to pay bonds, the issue of which was prohibited by the constitution and laws of the state.

Lippencott vs. Town of Pana, 92 Ill., 33,-4,-5, and authorities there cited.

These bonds having been issued in violation of the constitution and laws of the state, certainly the courts will not enforce the collection of the interest on them, and thereby divest the citizen of his property.

As the law conferred no power to issue these bonds, the issuing of them was the acts of the county officers, but **not the act of the county**. It is a false assumption to say that the county issued these bonds and put them on the market. The leading case of Marsh vs. Fulton County, 10 Wallace, 676, is in point here. In that case Fulton county, in this state, had issued to a Railroad Company interest bearing bonds, under act of November 6, 1849, in payment of a subscription by that county to a Railroad Company. The county, in that case like the case at bar, had not been authorized by a vote of the people to issue the bonds. Fulton county paid interest on these bonds for about ten years. Suit was afterward brought by Marsh against Fulton county on fifteen of these bonds. This Court in passing upon that case, after referring to the requirements of Section 4 of the act of November 6, 1849, say: "But it is earnestly contended that plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such was the fact we do not perceive how it could effect the liability of the County of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the

instruments might for such reason be taken without special inquiry into their validity. It is a case where the power never existed, and where the instruments might, with equal authority, have been issued by any other citizen of the County. It is a case, too, where the holder was bound to look to the action of the officers of the County, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper alleged to have been issued under a delegated authority, and is stated in the case of **Floyds Acceptances** [ante 173]. In speakingof notes and bills issued or accepted by an agent acting under a general or special power, the Court says: "In each case the person dealing with the agent knowing that he acts only by virtue of a delegated power must at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued." And in the same case the Court further say: "It is also contended that if the bonds in suit were issued without authority of law, their issue was subsequently ratified, and various acts of the supervisors of the County are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification. But the answer to them all, is that the power of ratification did not lie with the supervisors. A ratification is in its effect upon the act of an agent equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authorty of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to preform the act ratified".

It certainly cannot be argued that the County officers of Perry County, could by their acts alone (when said acts were prohibited by law) invest themselves by false recitals in the orders they had made on the county records of said county and by false recitals in said bonds invest themselves with power to bind the tax payers of said county, when their acts in issuing said bonds were their **individual** acts and were unknown to, and unsanctioned by the tax payers of said county. Can the county officers of said county by making such recitals estop the county or the tax payers from denying the power of said county officers to issue said bonds?

These bonds having been issued without authority of law are void, and the levy of taxes and payment of interest would not render them valid.

Schuyler county vs. Farewell, 25 Ill. 181.

Marshall county vs. Cook, 38 Ill. 48.

Lippencott et al. vs. Town of Pana et al. 92 Ill. 34,-5.

SECOND

The act incorporating said company will be found in Vol. 2 in "Private Laws of Illinois" of 1869 on pages 824,-5 and 6 is entitled **"An act to incorporate the Chester and Tamaroa Coal and Railroad Company"** and is in the words and figures following to-wit:

"Section 1." **Be it enacted by the People of the State of Illinois, represented in the General Assembly,** That Andrew J. Bryden, H. E. Hosford, De Witt C. Barber, Thomas M. Sams, William K. Murphey, Joel M. Sulivan, R. M Davis, John H. Barber, Zebidee P. Curlee, Joseph B. Holmes and John M. McCutchen, and their associates, successors and assigns, be and they are hereby created a body politic and corporate, under the name and style of "The Chester and Tamaroa Coal and Railroad Company;" and, by that name, be and they are hereby made capable in

law and equity to sue and be sued, plead and be impleaded, defend and be defended, in any court of law and equity in this state; to make, have and use a common seal, and the same to renew and altar at pleasure; and shall be and hereby are vested with all power, privileges and immunities which are or may be necessary to engage in mining, and to construct, complete and operate a Railaoad, with single or double track, commencing at Chester, in Randolph County, Illinois; thence running easterly, on the most eligible route, via, Pinckneyville, in Perry County, Illinois, to Tamaroa, in said Perry County; and for this purpose, said company are authorized to lay out their said railroad, not exceeding one hundred feet in width, through the whole length; and for the purpose of cuttings, embankments, stone or gravel, may take as much more land as may be necessary for the proper construction and security of said Railroad, and shall have power to extend the same to and connect with or cross over any other Railroad within the state of Illinois; and may make such lateral or branch road or roads to any coal lands belonging to said company as they may deem necessary for the successful prosecution of their business; and said company may enter upon and take possession of so much land as may be necessary for the construction and maintenance of the said railroad and branches, depots, side tracks, water stations, engine houses, machine shops and other buildings and appendages, necessary to the construction and working of said road, and in case said land be not donated to said company, for such purpose, it shall be lawful for said company to proceed to condemn said land, as provided by the laws of the state concerning right of way.

§ 2. The said corporation may take and transport upon said railroad any person or persons, merchandise or other property, and may fix, establish, take and receive such rates of toll for any passenger and property transported upon the

same as the directors shall from time to time establish, subject to such limitations and restrictions as are, or may be provided by general law.

§ 3. The said corporation is hereby vested with power to purchase, hold and convey real and personal estate; to give and receive promisory notes; to enter into and carry on all kinds of mechanical and manufacturing business; to erect mills, furnaces, foundries, factories and machine shops, for the manufacture of flour, lumber, iron, castings, machinery, farming utensils, and any other kind or description of article not forbidden by law; and may erect and build marine warf or dry docks, and use the same for the purposes of repairing and building boats, barges, or any other description of water craft; may buy, build and own boats, barges or other vessels, and navigate the same, for the transportation of their coal, manufactures or for other purposes.

§ 4. The Capital stock of said corporation shall be one million dollars, which may be increased to any sum not exceeding five million dollars, to be divided into shares of one hundred dollars each, which is hereby declared personal property, and transferable on the books of the company in such manner as shall be prescribed by the by-laws of said corporation.

§ 5. It shall be lawful for said company, from time to time, to borrow such sum or sums of money as may be necessary for completing and operating said railroad, or for conducting their mining or manufacturing business, and to issue and dispose of their bonds, in denominations of not less than one hundred dollars, bearing a rate of interest not exceeding ten per cent, per annum, for any amount so borrowed, and mortgage the real and personal estate of said corporation, or to convey the same by deed of trust, to secure the payment of any debt contracted by said company for the purposes aforesaid.

§ 6." In the sale or mortgaging of the real or personal estate of said corporation, the conveyances shall be signed by the president and countersigned by the secratary, under the seal of the corporation, and be acknowledged in the same manner as is provided by law for the acknowledging of deeds.

§ 7." The affairs of said company shall be managed by a board of eleven directors, which may be increased to any number not exceeding thirteen, a majority of whom shall constitute a quorum to do business; and Andrew J. Bryden, H. E. Hosford, De Witt C. Barber, Thomas M. Sams, William K. Murphy, Joel M. Sulivan, R. M. Davis, John H. Barber, Zebidee P. Curtee, Joseph B. Holmes and John M. McCutchen, are hereby appointed the first board, who shall hold their offices until their successors are elected and qualified, in such manner as may be prescribed by the by-laws of said company. Said board shall have the power of electing one of their number president and such other officers as may be prescribed by the by-laws; and said corporation shall be and is hereby vested with all the powers conferred upon railroad incorporations by the general railroad laws of the state of Illinois or any amendment thereto.

§ 8." This act shall be a public act, and take effect and be in force from and after its passage."

"Approved March 4th, 1869."

There was an act passed March 4, 1869 entitled **"An Act supplemental to "An Act to incorporate the Chester and Tamaroa Coal and Railroad Company."**

It will be found in "Private Laws of Illinois" of 1869, Vol. 2 on page 859 and is in the words and figures following to-wit:

Section 1. "**Be it enacted by the People of the State of Illinois, represented in the General Assembly,** That section three of said act, to which this act is supplemental, be and the same is hereby repealed, and in lieu thereof and the powers there in conferred, the said corporation shall have power to lease, purchase and hold real estate, along the line of their said road, and personal property, and convey the same so far as may be necessary to carry on the business of said corporation; and may, at any point or points along the line of their said railroad, manufacture iron or other minerals and may establish, maintain and operate machine shops and furnaces, for the purposes aforesaid; and may mine coal and establish such dock or docks, at the terminus of their road on the Mississippi river, as may be necessary to facilitate the transportation of their coal, iron, or other minerals.

§ 2. "This act shall take effect from and after its passage.

"Approved March 4th, 1869."

There is nothing whatever in said act or supplemental act, incorporating said Chester and Tamaroa Coal and Railroad Company, authorizing in anyway Perry county or any other county, to subscribe stock or issue bonds to said company, absolutely nothing.

One of the main objects of said incorporation is purely for a private purpose, and has no connection in anyway with any corporate purpose, or any thing which Perry county could have any interest in.

The 3rd Section of said act confers vast powers on said company. By that section, said company is authorized to purchase and hold vast amounts of real and personal property, to manufacture iron or other minerals, to establish and maintain machine shops and furnaces, to mine coal, establish docks, etc.

It certainly cannot be argued, that these or either of them, are for corporate purposes in anyway. Perry county was not established for the purpose of dealing in real estate or personal property, or manufacturing iron or other minerals, or mining coal, or establishing docks.

All these are foreign to the purposes for which Perry County was established, and I most **respectfully** insist that there never was any legislative authority for Perry county to loan its credit to, or take stock in, or issue bonds to said Chester and Tamaroa Coal and Railroad Company, because it was prohibited from so doing by section 5 of Article 9, of the constitution of the state of Illinois, (of 1848) which was in force from the year 1848, to the 2nd day of July 1870, when the present constitution of the state went into force. Said Sec. 5 of Art. 9, of said constitution, will be found in revised Statute of Illinois on page 53, as is in the words and figures following to-wit: 5. "The corporate authorities of counties, townsbips, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same, and the general assembly shall require that all the property within the lines of municipal corporations belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

The election to issue said bonds having been held in Perry County on Feb. 19th 1870, the constitution of Illinois of 1848, was in force at the time said election was held, and said constitution and the construction placed upon it by the Supreme Court of Illinois, prior to the date of said election, must govern as to the validity of said bonds.

I most respectfully insist, that if the legislature of Illinois, had passed an act expressly authorizing Perry County to subscribe $100.000 of stock to said Chester and Tamaroa,

Coal and Railroad Company, and issue bonds to pay the same, provided a majority of the legal voters of Perry County should vote for the same, and the County Court had submitted the proposition to the qualified voters of the county and a majority of them had voted in favor of it, that even then Perry county would have no power whatever to subscribe the stock or issue the bonds to said company; and the bonds if issued would have been absolutely void, because one of the main objects of the Chester and Tamaroa Coal and Railroad Company was to engage in manufacturing, which is not a corporate purpose nor germain to it anyway; and any law passed by the legislature of Illinois, to authorize any county in the state to contract or create a debt, or levy a tax for any purpose except a corporate purpose, would be in direct conflict with said section 5, of article 9, of the constitution of Illinois of 1848, which was in force at the time the act incorporating said company was passed, (March 4th 1869) and at the time of vote of the voters of Perry County to take stock and issue said $100.000 to said company.

The Supreme Court of Illinois decide in State Ex-rel vs. Maynard 14th Ill. 421, that a law cannot be in force in a state no matter when passed, which contraries the provisions of the constitution of the state.

The same rule is announced in Hill vs. Chicago 60th Ill. 92.

This rule of law is so well settled, that it is not necessary to cite other authorities.

The Supreme Court of Illinois in case of Howard et al. vs. St. Clair Drainage Co., decided by said court **at its January term A. D. 1869,** and reported in 31st Ill. 133, in passing upon said section 5, of article 9, of the constitution of Illinois of 1848, say: "We believe it has always been understood that this clause limited local or corporate taxation,

to local or corporate purposes, and it has always been so construed when its construction has come before this court."

This case was decided by the Supreme Court of Illinois (in Jan. 1869), more than a year before the election was held Feb. 19th 1870, to authorize the issue of the $100.000 in bonds last above named, and about one year before any of said bonds were issued. All of said bonds bear date on or after the 1st day of July A. D. 1871.

The Supreme Court of Illinois in case of Johnson vs. The County of Stark, 24th Ill. 75 (decided by said court at its April term, 1860,) must govern in this case as to the validity of said 100 bonds. In that case on page 88, the court say: "The erection of hotels, mercantile manufacturing, trading and banking houses, although of great importance to the prosperity of the community, are not such purposes as were contemplated by the framers of the constitution. These are properly regarded as matters of individual enterprise, and cannot in any reasonable or just sense, be regarded as public or county purposes."

The Supreme Court of Illinois at its Jan. term 1872, in case of Trustees vs. People 63rd Ill. 301 say: "Section 5, of Art. 9, of the constitution of 1848, provided that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for coporate purposes."

This section was a limitation upon the legislative power, and confined the grant of the right of taxation to corporate authority and for corporate purposes. Said constitution of 1848, was also in force on the the 6th day of Nov. 1849, the date of the passage of the law under which said $100.000 last named purporting to be issued. The records of the County Court of Perry County in evidence in this case show,

that the election for the issue of said bonds held on Feb. 19, 1870, was held under act of the legislature of Illinois approved November 6th 1849, and each of said bonds show by recitals on their face that they wered issue under said act and under the vote cast in Perry County at the election held Feb. 19th 1870. Section 5, of Art. 9, of the constitution of Illinois of 1848, having been in force at the date of the passage of said law Nov. 6th 1849, and of said election Feb. 19th 1870, and having been construed by the Supreme Court of Illinois, (as shown by the foregoing quotations) years before said bonds were issued, and being a judicial construction of the constitution of Illinois, by its Supreme Court, the construction given it by the Supreme Court of Illinois, is binding on this court.

The German's Savings Bank vs. The County of Franklin Illinois, 128th U. S. 526, and authorities there cited.

Both the reasoning and principle announced in Johnson vs. The County of Stark **supra** were fully approved by the Supreme Court of Illinois in Sleight et al. vs. The People 74th Ill. 48,-9.

Commissioners of Highways vs. Newel et al. 80th Ill. 587, and authorities there cited, and in Mather vs. City of Ottawa 114th Ill. 664,-5.

There never has been any conflict in the construction of said Section 5. of Art. 9, by the Supreme Court of Illinois.

This court in the case of County of Randolph vs. Post, 93rd U. S. 502, in passing on the validity of bonds issued by Randolph county to the Chester and Tamaroa Coal and Railroad Company under the said act held that said company was a railroad company within the meaning of said act of Nov. 9th 1849, and that the bonds were valid. By a **careful** reading of the opinion of this court in that case

it will be seen that the only question presented or discussed, by the attorneys for the county of Randolph as to legislative authority for it to issue the bonds involved in that case, was that the Chester and Tamaroa Coal and Railroad Company was not a railroad company within the meaning of said act of November 6th 1849, and by carefully reading the opinion of this court in that case, it will be seen that, that was the only question considered or passed upon by this court in that case. There is nothing in the opinion in that case, showing that said Section 5, of Art. 9, of the constitution of Illinois of 1848, was cited by the attorneys for the county of Randolph, nor that the attention of this court was in anyway called to the same, nor is there anything in the opinion of this court in said case, which shows that the attention of this court was in any way called to the construction given by the Supreme Court of Illinois, to said Section 5, of Art. 9, of the constitution of Ill. of 1848, in Johnson vs. County of Stark supra, nor in Howard et al. vs. St. Clair Drainage Co, 51st supra. Trustees vs. The People supra, nor in Sleight vs. The People 74th Ill. supra, and authorities there cited; for if the attention of this court had been called to the construction given by the Supreme Court of Illinois, of said section 5, of Art. 9, of the constitution of Illinois of 1848, in the cases last cited, we submit that the decision of this court in County of Randolph vs. Post, supra, would have been in harmony with the construction of the Supreme Court of Illinois of said Sec. 5, of Art. 9, of said constitution of 1848 as announced in the cases last above named; for the Supreme Court of Illinois had construed said Sec. 5, of Art. 9, in all the cases last above cited, many years before Perry county Randolph ever issued any bonds to said Chester and Tamaroa Coal and

Railroad Company; and under the construction given thereto by tha Supreme Court of Illinois in the case last above cited, it is settled beyond all question that no county in the state of Illinois had any power in anyway to take stock in or issue bonds to a manufacturing company, but that counties in said state were prohibited from so doing by said constructions. The Supreme Court of Illinois, as shown in the cases last above cited, years before the said bonds were issued construed said Sec. 5, of Art. 9, and in said construction stated clearly and definitely, that a county in the State of Illinois, had no power to take stock in or issue bonds to a manufacturing company; and it is a well settled rule of this court that in passing on the validity of municipal bonds, that their validity will be determined by this court in accordance with the construction given to the laws of the state by its Supreme court at the time the bonds were issued and prior thereto.

I most respectfully insist that the bonds issued by Perry county to said Chester and Tamaroa Coal and Railroad Company, were issued without any legislative authority, that they were issued in direct conflict with said section 5, of Art. 9, of the constitution of Illinois of 1848, as construed by the Supreme court of Illinois, prior to and at the time of their issue, and that they are absolutely void, notwithstanding the decision of this court in case of the county of Randalph vs. Post, supra, for I most respectfully insist that the rule announced by this court in that case, is not in harmony with many recent decisions of this court announced since that decision.

Mr. Justice Blacthford, in delivering the unanimous opinion of this court in case of The German's Savings Bank vs. The county of Franklin, Illinois, 128th U, S. page 526, in passing on the validity of municipal bonds, and referring to the effect of the decision of the Supreme court of Illinois, in case of Town of Eagle vs. Kohn, 84th Ill. page 292, said:

"This court must recognize this decision of the Supreme court of Illinois, as an authoritative construction of the statute, made before the bonds were issued, and to be followed by this court. (**Douglas vs. County of Pike, 101st U. S. 677, Burgess vs. Selingham 107 U. S 20, Green Co., vs. Conness 109 U. S. 104, Anderson vs. Santa Anna. 116 U. S.**) In the first of these cases it was said: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the Statute as the text itself."

This court in case of German's Savings Bank vs. The county of Franklin supra, in speaking of the rule announced in that case, and wherein it differed from the rule announced in the county of Randolph vs. Post, supra, as to terms and conditions of vote etc., say: "In county of Randolph vs. Post (93 U. S. 502), the bonds were issued by the county of Randolph in Illinois, January 1st 1872, under a vote of the people held June 6th 1870, which imposed a limitation of time as a condition precedent. In October 1871, the county court extended the time from December 27th 1871, to Feb 1st 1872. This court held that it could do so, notwithstanding the provisions above cited in the constitution of **July 2nd 1870. But the act of April 16th 1869, does not appear to have been before this court."**

This court in German's Savings Bank vs. The County of Franklin supra, in speaking of the difference between the rule announced in that case, and the rule announced in Pana vs. Bowler 107th U. S. 529, as to the construction of act of April 16th 1869, and the seperate section of the constitution of Illinois of 1870, also say: "In Pana vs. Bowler. the bonds were issued by the town of Pana in Illinois, June 23rd 1873, prior to the decision in **Town** of Eagle vs. Kohn.

The vote ot the people of the township was had on April 30th 1870, while the act of April, 16th, 1869, was in force, and the bonds as in the case of Insurance Co., vs. Bruce, recited on their face, not only that they were issued in compliance with the vote, but that they were issued in accordance with the provisions of the act of April 16th 1869.

No point was raised in that case, that the bonds having been issued after the new constitution of Illinois came into force on July 2nd 1870, in pursuance of a vote of the people had on April 30th 1870, conditions prescribed by that vote had not been complied with."

In Tenceyck vs. The Canal Company 3rd Harris 200, the court say: Public corporations are political corporations, such as are founded wholly for public purposes, and the whole interest of which is in the public." Believing that the Chester and Tamaroa Coal and Railroad Company is a private corporation, and that it has none of the elements of a municipal corporation, and that the rule announced in county of Randolph vs. Post supra, is in conflict with more recent decisions of this court, and in direct conflict with the decisions of the Sepreme Court of Illinois, rendered prior to said decision; I most respectfully submit that the rule announced in that case is not in point here.

But it may be said that this company is a railroad company, as well as manufacturing company. I readily admit that it is, but insist that it is none the less a manufacturing company, because it is also a roalroad company. Counties in Illinois were established solely for governmental purposes, and not for trade or traffic or manufacturing.

There is no relevancy or similarity in anyway, between the duties of county officers and the purchasing of real estate, personal property and conveying the same, or manufacturing iron or other minerals, nor to establish, maintain and operate

machine shops and furnaces for such, nor mine coal, nor establish docks.

The Chester and Tamaroa Coal and Railroad Company is authorized by its charter to do all these things, in fact carrying on these immense manufacturing enterprises seem to be the main object of its charter, but certainly none of these are in any sense a corporate purpose for Perry county.

The Supreme Court of Illinois in Trustees etc., vs. The People 63rd Ill. 301 say: "Under our system of state government counties * * * are but different parts of the machinery which constitute the state. They have the power to establish, improve and control public highways and streets, and the legislature might confer upon them the power to assess and collect taxes, for purposes intimately connected with their organization and essentially conducive to their existence and their advancement from a new and sparse settlement to a progressive civilization. They must keep pace with the onward and rapid progress around them, and secure the means of communication with the markets of the world. Without this they would perish and the object of their formation be thwarted.

In this view alone have the courts been enabled to sustain laws, which have allowed such municipal corporations to grant aid to railroads; but no one has been bold enough to advocate that these corporations should take a step in advance, override the constitution, and engage in matters wholly disconnected with the object of their creation. * * * Such projects and pursits pertain to the citizen and priyate corporations in the use of their means, but are **wholly foreign to the legitimate business and objects of a municipal corporation.** By the 3rd section of its charter, this company is empowered to establish docks on the Mississippi river."

The Supreme Court of Illinois at its April term 1866, in the case of Taylor vs. Thompson 42nd Ill. page 10 say: "A tax for a corporate purpose may be defined to mean, a tax expended in a manner which shall promote the general prosperity and wellfare of the municipality which levies it."

This company is authorized by its charter to establish docks on the Mississippi river. No part of Perry county is within 20 miles of the Mississippi river.

Would the establishing of these docks in Randolph county be a corporate purpose for Perry county?

It will be seen by reference to 3rd section of the charter of this company (heretofore printed in this branch of this argument), that said company has no power by its charter to erect said docks at any place except "at the terminus of their road on the Mississippi river."

The terminus of said road would be in Randolph county Illinois, on the West bank of the Mississippi river, more than 20 miles from any part of Perry county

Would the establishing of docks on the Mississippi river in Randolph county, be a corporate purpose for Perry County?

Does it not strike the mind at first, that the establishing of these docks has no connection or similarity in anyway or manner of the corporate affairs, or county government of Perry County?

Is there any similarity whatever between the duties of any of the county officers of Perry County and the establishing of docks in Randolph County Illinois?

What interest could Perry County have in them, or what authority or control could it exercise over them in anyway?

But again, the charter of this company gives it power to mine coal, manufacture iron, and other minerals, to lease,

hold and purchase any amount of real estate, and there is nothing in the charter requiring this company to carry on any of this business in Perry County, but under its charter it may carry on all this business in Randolph County.

Should this business be carried on in Randolph County, certainly the machinery used to carry it on, would be taxed in Randolph county, and Perry county could not receive any revenue from it by taxation for county purposes.

Would it not enrich Randolph county and impoverish Perry county?

Would it be a corporate purpose for Perry county, or in anyway promote its prosperity or wellfare?

Would it not be in direct conflict with the interest, prosperity and wellfare of Perry county?

Can it be argued that mines, manufacturies, docks etc., in Randolph county, is a corporate purpose of Perry county?

Could Perry county have any voice or control in their management, if so in what way?

The manufacturing would be controled entirely by the officers of the company; and suppose they should determine that the profits arising therefrom to Perry county and the other stock holders, should be paid in coal or iron; what county officer or Perry county would be required by law to receive the coal and iron for Perry county?

Would there be any buildings in Perry county to store it in?

What officer should sell it for Perry county?

Should it be sold for cash or on a credit?

A county has no freight or store houses.

Can the owning, purchasing, selling and leasing of real and personal property in Randolph county, be a corporate

purpose of Perry county, or promote its general wellfare and prosperity?

Can Perry county be compelled to contribute $100.000 in interest bearing bonds, to develop the resources of Randolph county, and thereby enrich the people of Randolph county, and impoverish those of Perry county?

Would it not be like a law compelling John Doe to donate to Richard Roe $100.000, for the purpose of enabling Roe to open mines, carry on manufacturing etc?

Would not the carrying on of all these industries in Randolph county, draw trade from Perry county, and cause the laborers of Perry county to emigrate to Randolph county to get employment?

Can the property of the tax payers of Perry county be confiscated and given to a manufacturing company to carry on manufacturing, mining, etc , in Randolph county?

If so where will taxation cease, or what limitation can be imposed?

What right has the manufacturer to public aid, any more than anyother honest employment?

No discrimination should be made in favor of one branch of industry, for a discrimination in favor of one is a discrimination adverse to all other branches. All should be equally protected. The taxpayers of Perry county should not be taxed to erect docks, mine coal and manufacture iron and other minerals in Randolph county.

Judge Cooley in his able work on taxation page 78, says: "The right to exercise the power of taxation in aid of the manufacturing enterprises, of private persons or corporations has seldom been asserted; and whenever asserted has been most emphatically denied. The views of the learned

Chief Justice of Maine, on this subject have been so clearly and pointedly stated in response to an inquiry by the executive, whether the legislature has authority under the constitution to pass laws enabling towns by gift of money or loans to bonds to individuals or corporations, to establish or carry on manufactures that it deemed advisable, to present the material portions of his negative reply in the note 1."

Note 1. referred to by Judge Cooley is as follows: "The line of demarcation may not always be clear and distinct and well defined, between what is for public and governmental, and what is for private purposes, between the general legislation for the whole people and the special for the individual, but the questions proposed leave no doubt to as the special phase of legislation to which they refer. * * * Individuals and corporations embark in manufactures for the purpose of personal and corporate gain. Their purposes and objects are precisely the same, as those of the farmer, the mechanic or the day laborer. They engage in the selected branch of manufacture for the purpose and with the hope and expectation not of loss but of profit. * * * They are engaged in private and corporate undertakings for private and corporate emoluments. All municipal, police, educational, public or governmental purposes, whether of peace or war, is excluded from our consideration by the manifest purpose of the inquiry. * * * The general benefits to the community resulting from every description of well directed labor, is of the same character whatever may be the branch of industry upon which it may be expended. All useful laborers, no matter what the field of labor, serve the state by increasing the aggregate of its products and wealth. There is nothing of a public nature any more entitling the manufacturer to public gift, than the sailor, the mechanic, the lumberman or the farmer. Our goverment is based upon an equality of rights. All honest employments are honorable. The state cannot rightfully

discriminate among occupations, for discrimination in favor of one branch of industry, is a discrimination adverse to all other branches. The state is equally to protect all, giving no undue advantage, or special or exclusive preference to any."

This court in case of Loan Association vs. Topeka, 20th Wallace, 655,-664, in passing on the validity of bonds issued by a municipality in aid of a manufacturing company say: "If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of other business or pursuit which employs Capital or labor. The merchant, the mechanic, the inn keeper, the banker, the builder, the steamboat owner are equally promoters of the public good and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two thirds of the business men of the city or town." This court in that case, after a most thorough and careful consideration held the bonds absolutely void, because they were not issued for a corporate purpose.

For clearness and sound reasoning, the opinion of this court in that case has certainly never been excelled. And I insist that there is no conflict at home or abroad with the rule announced in that case.

If a manufacturing company can by being combined with, or tacked on to a railroad company, get aid out of the county treasury, when the same was prohibited by the constitution and laws of Illinois, and thereby evade the constitution and laws of the state, then in the language of this court in Loan Association vs. Topeka, supra **"Any other business or pursuit which employs Capital or labor, the merchant, the mechanic, the inn keeper, the banker, the builder, the steamboat owner are**

equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No live can be drawn in favor of the manufacturer, which would not open the coffers of the public treasury to the importunities of two thirds of the business men of the city or town."

At the time Perry County voted on the proposition to issue $100.000 in bonds to this company, (Feb. 19th 1870) the law was well settled that it had the power to take $100.000 in stock in a railroad company, and issue bonds for same, provided it was authorized to do so by a vote of the people of said county, in the manner prescribed by law; and at that time the law was also well settled that Perry County had no power whatever to take stock in or issue bonds to a manufacturing company. It was prohibited from so doing by the then constitution of the state, as we have above shown by decisions of the Supreme Court of Illinois, rendered years before Perry County voted on the proposition, to take $100.000 stock in said company and issue bonds therefor.

Now if this manufacturing company, can by being combined with a railroad company receive aid from the county, then the constitution of the state can be evaded and rendered inoperative, and be violated at any time by evasion, and amount to nothing in law and **"any other business or pursuit which employs Capital or labor"** receive aid from the county, by evading the constitution in a similar manner, and the very object of this constitutional provision be defeated. Taxation in aid of private enterprises is taxation "to load the tables of the few with bounty, that the many may partake of the crumbs that fall therefrom."

Both the constitution and law of Illinois prohibited the county officers of Perry County from issuing this $100.000 in bonds to said company.

The Supreme Court of Illinois, in case of Taylor vs. People 66 Ill. 322 say: **"Acts of officers prohibited by law are utterly void and estop no one, whether officer or stranger."**

Can the breath of legality and life be breathed into county bonds by evading the constitution?

Can county officers indirectly do an act and make it valid, where they were prohibited by the constitution of the state from so doing? If so, where is there any security in property?

Can officers of a county in an indirect way, give vitality and legality to their acts, when they were prohibited by the constitution of the state from doing those acts?

If they can, it would be equivalent to saying, that an agent not having the power to do a particular act for his principal, could create the power to do, and give validity to such acts, and his principal would be powerless to prevent it. But again, let us admit for the **sake of argument only,** that there was nothing in the constitution of Illinois, which prohibited Perry County from subscribing stock and issuing bonds to the Chester and Tamaroa **Coal** and Railroad Company. I insist that under well settled rules of construction, that Perry County would have no power to take stock in or issue bonds to said company (even if not prohibited by the constitution of the state of 1848), because the act of Nov. 6th 1849 (recited on their face) never authorized Perry County to issue said bonds or either of them to said company; and the bonds are therefore void, and as they refer by recitals on their face to (act of Nov. 6th 1849) the law under which they were issued, the purchaser was bound at his peril to take notice of said law, and of all of its provisions.

Mr. Chief Justice Wate, in delivering the unanimous opinion of this court in McClure vs. Township of Oxford

said: "Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute under which they were issued and of all its requirements."

The same rule is announced by the Supreme Court of Illinois, in Gaddis vs. Richland County 92nd Ill. 126; Lippincot vs. Town of Pana, 92nd Ill. 34.

Now by a careful reading and study of said act of Nov. 6th 1849, I insist that there is not one word or sentence in it in any way authorizing Perry or any other County in Illinois, to take stock in or issue bonds, under any circumstances to a manufacturing company. And all that any County in Illinois could do under said act under any circumstances, was to subscribe stock and issue bonds to a Railroad Company, when authorized so to do by a vote of the people.

This act of November 6th 1849, extended the powers of counties in Illinois, and increased the burdens of taxation, and it being a well settled rule of construction that statutes extending the powers of corporations or increasing the burdens of taxation, must be strictly construed.

Chestnutwood et al. vs. Hood et al. 68th Ill. 138, and as above stated there is nothing in said act authorizing the taking of stock or issuing of bonds to a manufacturing company, or in anyway authorizing any county under any circumstances, to subscribe stock or issue bonds to a Railroad Company where it was combined with a manufacturing company, nor to any company or corporation, the object of which was to do anything except to construct and operate Railroads. There certainly never was any authority to issue the bonds to The Chester and Tamaroa Coal and Railroad Company.

Judge Cooley in his able work on taxation on page 209, says: "In the construction of any grant of power to tax made by the state to one of its municipalities, the one which

is accepted by all authorities is that it should be with strictness. The reasonable presumption is held to be, that the state has granted in clear and unmistakable terms, all that it has intended to grant at all, and whatever authority the municipal officers assume to exercise they must be able to show their warrant for in the words of the grant. There is no inherent power in municipalities to levy taxes. They can only tax as the state in its wisdom has thought proper to permit, and if the state has erred in its direction of strictness the legislature alone can correct the evil."

Let us take into consideration the policy of the State of Illinois, in granting power to its municipalities to take stock in and issue bonds to railroad companies (which that the power does not exist unless it is given in express terms) and bearing in mind that the legislature when it passed said act of 1849, was presumed to have known the policy of said state and the rule of construction of the Supreme Court of Illinois, relative to the construction of such powers, and test said act by said rule and see if there was any power to issue said bonds.

Is not the power to issue said bonds under said act (by well settled rules of construction) as clearly denied, as it would be if there was a provision in said act expressly prohibiting Perry County from subscribing any stock to, or issuing any bonds to the Chester and Tamaroa Coal and Railroad Company?

This Court in case of Hill vs. Memphis 134th U. S. 198, announce the rule, that all grants of powers to a municipal corporation, to subscribe for stock in Railway Companies, are to be construed strictly and not extended beyond the terms of the Statute.

This Court in Fertilizer Co. vs Hyde Park 97th U. S. 659, by Justice Swayne say: The rule of construction in

this class of cases is, that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public wellfare. **It is axiomatic in the jurisprudence** of this court. The same rule is announced in case of Thomas vs Railroad Co. 101st U. S. 71, and in Charles River Bridge vs. The Warren Bridge 11, Peters 420, where numerous authorities on this subject are collected and reviewed."

The Supreme Court of Illinois in case of Mills et al. vs. St. Clair County reported in 2nd Gilman page 228 (**Decided at its December term 1845**) say: "Public grants should not be extended by implication in favor of the grantee, beyond the natural and obvious meaning of the words employed, even if by such construction the grant is utterly defeated."

In case of Common Wealth vs. Erie & North Western Railroad Co. 27th Pa. St. 339, Black, C. J., in rendering the judgment of the court says: "That which a company is authorized to do by its acts of incorporation, it may do; beyond that all its acts are illegal and all power must be given by plain words or by necessary implication. All power not given in this direct and unmistakable manner is withheld. * * *" In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature confering them. Failing in this you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because what is doubtful is decisively certain against the corporation." The same rule is announced by

Judge Dillon in his able work on Municipal corporations Vol. 1, page 173, Section 55. The whole current of authorities at home and abroad announce the rule, that all doubts in a charter must be resolved in favor of the state, and also that where any reasonable doubt of the meaning of any part of a charter arises, we at once must solve that doubt by saying that the thing does not exist in it. **"A doubtful charter does not exist."**

Judge Dillon in his able work on Municipal Corporations Vol. 2, Section 605 says: "It is a principal universally declared and admitted, that Municipal Corporations can levy no tax general or special upon the inhabitants or property unless the power be plainly and unmistakably conferred. Indeed it has often been said that it must be specifically granted in terms, but all courts agree that the authority must be given either by express words or by necessary implication and that it can not be collected by doubtful inference from other powers relating to other subjects nor deduced from any consideration of advantage. It is important to bear in mind that the authority of municipalities to impose burdens of any character is wholly statutory, and as its exercise may result in a divesture and transfer of property, it must be clearly given and strictly pursued."

I ask where is there any authority in any part of said act of Nov. 6th 1849, authorizing Perry County in any way to levy a tax to pay interest on bonds issued partly in aid of a manufacturing company.

The word manufacture, nor mining coal, erecting docks, or buying or selling real estate nor either of them, nor any reference to either of them is not in any way to be found in said act of Nov. 6th 1849, nor in any part of it.

The Supreme Court of Illinois in case of English vs. The Peopie 96th Ill. 569, say: "It devolves upon the

people to show that the tax which is sought to be collected has the sanction of law to support it."

"Legislative authority must be shown for every levy of taxes." Cooleys Constitutional limitations (first edition) page 518. "**And this rule** applies to the political divisions of the state, the same as it does to the state at large." I'bid.

The power to tax reaches all classes of people and can be used in favor of some persons and against others, so as to enrich one class and bankrupt the other, if there is no limitation on the taxing power.

If the legislature in passing said law had intended to give any county in Illinois, power to take stock in a manufacturing company, they would have said so in said law in plain and unmistakable language. Soper vs. Henry Co. 26th Iowa 264.

Dillon on Municipal Corp. Section 107.

Cooper vs. Manufacturing Co. 1st Sneed Tenn. 698.

Clark vs. Dennis 19th Iowa 199.

Cooley's Const. Limitations 212.

By the first section of its charter, this company is not authorized to construct its road from Chester in Randolph County to Tamaroa in Perry County, but is authorized to make branch road or roads to any **Coal** lands belonging to said company as they may deem necessary for the successful prosecution of their business. By the third section of its charter, this company is not only authorized to erect docks and carry on an immense manufacturing business, but is expressly authorized to **purchase and hold** real estate.

Both of these sections should be construed together, and there is nothing in either of them or in any other part of the act incorporating said company, limiting the amount of real estate it may own. It may under said act incorporating it,

buy all the coal lands in the State of Illinois. Nor is there one word or sentence in said act or any part of it, requiring it to sell any of the lands which it may own, absolutely nothing. It may own them forever. Under this act it may own all the coal lands in the State of Illinois and thereby create a perpetuity. Would not the owning of large bodies of land by this company, be against public policy? Would it not have the effect to tie up the land and Capital of the country? Obstructing thereby the free and active circulation of property, checking the improvement of the land and rendering its acquisition difficult and in short to every disposition of it savoring of a **perpetuity,** "which the law abhors."

A slight examination into the past history of the legislature of the State of Illinois, will certainly convince any one that it has ever been a cherished policy of said state if not to extirpate all species of perpetuities, at least to circumscribe them within extremely narrow and harmless limits.

The case of Carroll vs. East St. Louis, 67th Ill. 572.-3, is in point here.

The Supreme Court of Illinois in a learned and able opinion in that case on the subject of public policy, after a thorough and full review of the past legislation of Illinois said: "Our General Assembly have in a variety of modes, and on a very large number of occasions manifest in unmistakable terms a determination, that perpetuities in real estate shall not exist in this state. * * * The policy of the legislature in this country ever since the establishment of our form of government, has been with a view to have all free to acquire property, and to protect and foster no class, by conferring special privileges or even permitting wealth to be placed in the hands of a portion, to be held in perpetuity. In fact its pernicious influences were so clearly seen and felt in Great Britain, that perpetuities have been discountenanced in their

Jurisprudence. The theory of our own government is that not only the laws must protect all alike, but that every citizen must be left equally free in the pursuit and acquisition of property. * * * Of the same nature as the feudal system, were the monasteries and religious houses that acquired large bodies of land and held them in perpetuity. The prejudicial effects of this policy were at an early day felt, as it took real estate out of the commerce of the country, and was found to be a serious impediment to national prosperity, if not to advancing civilization."

Again in the same case on page 574, the Supreme Court of Illinois further say: "Our General Assembly have, from the very organization of our government, manifested a clear and decided opposition to permitting corporate bodies to hold lands to any great extent in perpetuity. In granting charters to insurance, agricultural **manufacturing,** and benevolent organizations, of which we have large numbers, as a general rule, with it may be a few exceptions, were authorized to buy and sell lands, they have been restricted to a small quantity. So jealous has been the legislature of the power to purchase and sell lands by these organizations, that it adopted as a policy that the authority thus given should not be perverted and abused; that they as an undoubted policy limited the power to only enough of real estate to enable them to carry out and accomplish their organizations other than buying and selling real estate * * * And wherein such charters power has been given to receive donations of lands they have almost invariably been required to sell it in three, five, seven or ten years at most, thus unmistakably showing a settled policy **that no means should be possessed by corporations whether as the primary or auxillary purpose of their creation to hold lands in perpetuity."**

These bonds were issued to this company under the law of November 6th 1849. And under a well settled rule of construction this law must be strictly construed, and in construing it the words used in the law itself must govern in arriving at the intention of the legislature in passing the law (U. S. vs. Fisher, 2d Chranch, 358; People vs. Purdy, 2d Hill, 31,) and as the constitution of the state in force at the time this law was passed, prohibited a county from taking stock in a manufacturing company, now bearing in mind this rule of construction, and this constitutional provision, and the well settled policy of this state as to perpetuities prior to the passage of this law, and so clearly and ably defined by this Court in Carroll vs. East St. Louis, **Supra;** and also bearing in mind the presumption that the legislature at the time they passed the act of 1849 knew the policy of this state, and the rule of construction of such laws, how can it be argued that it was the intention of the legislature in passing the act of 1849 to authorize a county to take stock in a company which, by its charter, has power to purchase millions of acres of land, and hold them for any length of time the company might choose?

Are not the powers given to this company in its charter to purchase real estate against public policy, as defined by this court in Carroll vs. East St. Louis. **Supra?**

Was it the intention of the legislature in passing the law of 1849 to authorize a county to take stock in a matter which is against public policy?

Can such an intention be imputed to the legislature? If they had intended to give Perry County power to take stock in this company, why did they not say so in clear and unmistakable terms? The charter of this company is silent on that subject.

It has ever been a cherished policy of this state to restrain the disposition of lands whereby they become inalienable or

prevent them from going into perpetuity by falling into the hands of parties who never die———corporations 2d Kent, * 282; Carroll vs. East St. Louis, **Supra.**

The evils of landed perpetuities are universal, and more to be dreaded in republican than in monarchial goverments. 4th Kent, * 20,-1.

To permit corporations to purchase land without limit as to the number of acres, and own them indefinitely, would certainly take the lands out of the market and prevent the citizens from acquiring it for homes, and would certainly create a system of tenancy, and thereby make citizens feel but little interest in improving the lands of the state.

"Tenancy is unfavorable to freedom. It lays the foundation of separate orders in society. It destroys the love of country and weakens the spirit of independence. The farming tenant has, in fact, no country, no hearth, no domestic altar. The free holder, on the contrary, is the natural supporter of a free goverment, and it should be the policy of republics to multiply their freeholders."

It has ever been the policy of this state that the lands be free from perpetuities and entailments, and susceptible of ready and easy alienation, so that every citizen could own a home, and would feel an interest in the development, improvment and prosperity of the country. "Home is a beacon-light of civilization." **"Be it ever so humble, there is no place like home."**

An unbroken series of legislative acts and a long train of decisions have alike been directed against the lands of this state falling into **dead hands.** The sound doctrine formulated in **Magna Charta** favoring **alienations**, and levelled at the attempts which have been so repeatedly and successfully made to place large bodies of valuable land in such a condition as to be abstractly different from other lands is in

force here, and universally recognized as an important element in our civil polity.

A corporation is destitute of patriotism. It has "no soul." I knew of no case except this, where county officers have been so bold and reckless as to set up a policy of their own in direct conflict with the policy, constitution and laws of the state, and confiscate the property of the tax-payers of the county to build up, cherish and foster a scheme which has a direct tendency to lessen patriotism and the spirit of independence, and to diminish the prosperity and well being of the country; to cherish and foster a scheme which is unfavorable to freedom and lays the foundation for separate orders in society.

Certainly the issuing of the 100 bonds to the Chester & Tamaroa Coal and Railroad Company was not for a corporate purpose in anyway. And how can it be argued that the legislature, in passing the act of November 6th 1849, ever intended or thought of a county issuing bonds to a company which was chartered mainly for the purpose of purchasing real estate and manufacturing? There is nothing in the law of 1849 which shows that the legislature in passing it ever intended to change the policy of the state in anyway. In construing this law the policy of the state before and since its passage should be taken into consideration. The presumption is that the legislature when it passed the law of Nov. 6th 1849, intended to observe the then, well settled policy of State of Illinois, and did not intend to depart from it in anyway, (and as there is nothing whatever in said act showing any intention on their part to depart or vary from the policy of the State of Illinois) this presumption cannot now be questioned in anyway.

Believing that many of the powers granted to said company are against the policy of the State of Illinois, which had been so well settled prior to the passage of the act of Nov.

6th 1849, that by well settled rules, of construction Perry County never had any **legislative** authority to issue any of said bonds to said company, even if there had been nothing in the constitution of Illinois of 1848, prohibiting the issuing of bonds to said company.

The constitution of Illinois of 1848 prohibited the issue of these bonds to said company, and many of the powers granted to said company being against the well settled policy of Illinois, prior to the issue of said bonds and prior to the passage of the act of Nov. 6th. 1849, how can it be argued that there ever was any legislative authority to issue said bonds; and if there was no legislative authority authorizing their issue, they are absolutely **void,**

But it may be claimed that as both series of bonds involved in this case have been registered in the auditor's office for more than fifteen years, that consequently taxes have been collected to pay the interest on them, and that the interest has been paid on them, and that although there was no power in the first place to issue the bonds, the payment of the interest on them has made them valid.

The Supreme Court of Illinois, in Schuyler County vs. Farewell, 25th Ill. 181, Marshall County vs. Cook 38th Ill. 48, and Lippencot et al. vs. Town of Pana et al. 92nd Ill. 34,-5, announce the rule that where a county or other municipality issues bonds without authority of law, **that the levy of taxes and payment of interest does not render them valid.**

The same rule is announced in School Directors vs. Faleman et al 76th Ill. 189, and authorities there cited.

Herman's Law of Estopel, Section 224.

Taylor vs. District Township of Wayne, 25, Iowa 447.

Elmwood vs. Marcy, 2 Otto, 289.

The same rule is announced by the Supreme Court of the United States in the leading case of Marsh vs. Fulton County, 10 Wallace, 776-7-8. This rule of law is so well settled that it is a waste of time to cite other authorities in support of it.

The issue of these bonds was prohibited by law, and the the breath of legality and life cannot be breathed into them.

This court, in Taylor vs. People, 66th Ill. 322, say: **"Acts of officers prohibited by law are utterly void, and estop no one whether officer or stranger."**

This same rule is announced by Bidgelow on Estopel, pages 508, and 475 to 490. There is no conflict of authority on this point at home or abroad.

But it may be said that these bonds are in the hands of persons who have paid a large price for them, and to hold them void would work great hardship and injustice. The same may be often said of anyother person who violates the law, or acts contrary to its provisions. The person buying these bonds did it in the face of the constitution and statute prohibiting their issue. Every person is bound at his peril to know the law, and is bond to know that county officers can only exercise such powers as are giyen them by the constitution and laws; and every person dealing in these bonds was bound to know that the county officers had no power to issue them, and if they purchased these bounds before learning that the county officers had no power to issue them it is their misfortune. But should it work a hardship on the bondholders, that is no reason why the bonds should not be held void. The rights of the people depend upon a rigid adherance to the constitution and laws and their enforcement.

As the county officers could only exercise such powers as the law conferred, and as it conferred no power to issue either series of said bonds, the issuing of them was not the

act of the county. It is a false assumption to say that Perry County put these bonds on the market. If the acts of any class of officers should be valid only when done in conformity with law, it is those who manage the affairs of counties in creating debts which not they, but the property owners must pay. If one of two innocent persons must suffer on account of the unauthorized acts of County officers it is clear that the bond-holder who could, before parting with his money, by reading the records of the county and the constitution and laws of the state, have learned that the issue of said bonds was not authorized, should lose his money rather than the property owners of Perry County, who might not know anything of the matter, or if he did could not prevent the wrong.

Certainly both series of bonds were not only issued without any authority of law, but were issued in direct conflict with the constitution and laws of the state. Can the officers of a county, by exceeding their authority, create a power which never existed and thereby confiscate the property of the taxpayers. Not only the laws of the state but the records of Perry County were all public, all open and accessible to all. Are bonds which are issued in violation of the constitution and laws to be collected out of the property of the taxpayer who owns any in the county?

The officers who issued these bonds were the officers of the law, acting without the consent of the taxpayer, and acting contrary to his wishes.

It may be said, and would look plausible if said, that if a county puts bonds on the market it must pay them. But it is another thing to say that when county officers, created by law, exceed the authority which the law conferred on them, and in open violation of the constitution and laws, issues bonds and puts them on the market, that the taxpayers

of the county must pay them, though they had no part in anyway in their issue, and no power to prevent it.

THIRD.

As heretofore stated the evidence in this case shows beyond all question, that there was no vote of the people of Perry County authorizing said county to issue said 100 bonds to the Chester and Tamaroa Coal and Railroad Company, and while the evidence shows that the voters of said county voted on the proposition for said county to issue said 100 bonds to said company on Feb. 19th 1870, yet the evidence shows beyond all question, that a majority of the voters of said county did not at said election vote in favor of said proposition, but said proposition lacked 27 votes of receiving a majority of the voters of the county.

Hence the issue of said bonds was not authorized by a vote of the people of Perry County any more than it would have been if there had never been any election or vote in Perry County on the proposition for it to issue bonds to said company.

How then, in as much as said said separate section of the constitution prohibited and County in Illinois from issuing bonds to a Railawy Company unless authorized by a vote of the people (prior to its adoption July 2, 1870) to do so, can it be argued that the issue of said bonds was authorized by a vote of the people of Perry County prior to July 2nd 1870.

Can the false recitals made by the county officers of Perry County in said bonds, and in orders made and entered on the records of said county, be of greater force and effect than the constitution of the state? And if they can in this case by false recitals, evade and disregard a part of the

of the state, could they not by false recitals in other matters pertainning to the affairs of Counties evade and disregard every other Constitutional provision in Illinois, relative to their administration of the affairs of counties? And thereby set up a policy in Illinois contrary to its constitution and laws and the taxpayers would be without any remedy.

There is no recitals in any of the bonds or in any of the orders made by the county officers of Perry County, showing in anyway that any of said bonds were isued in accordance with the saving clause of the separate section of the constitution of Illinois of 1870.

The Supreme Court of Illinois has repeatedly announced the rule, that the actual existence of the facts giving power to the officers to issue the bonds under said separate section of the constitution, conferred the power, but that false recitals do not confer the power.

That the constitution cannot be annulled in that way, and the property of the tax payer confiscated to pay bonds when their issue was prohibited by the constitution of the state.

Lippencot vs. Town of Pana 92nd Ill. 33,-4,-5 and authorities there cited.

People ex-rel vs. Jackson County 92nd Ill. 45 and authorities there cited.

The acts of the county officers in issuing said bonds are worthy of the admiration of all those who desire to profit by the unauthorized acts of county officers, and to confiscate the property of the taxpayers to pay bonds issued in direct conflict with the constitution and laws of the state.

These bonds wear the badge of constitutional condemnation. Every intendment and presumption of law is against

them, and the plaintiffs must meet and avoid a prohibition of the constitution against them, which in general terms denies all power on the part of the county to issue them, with a saying proviso that if authorized under existing laws by a vote of the people of the county, prior to the adoption of the constitution of Illinois (July 2nd 1870), they are valid.

Now can this inflexible prerequisite of the constitution of the state be met and satisfied by the same measure of evidence only that would have been sufficient on the part of holders of bonds before its adoption?

Can these essential facts which save the bonds from the general prohibition of the constitution be assumed or admitted, until there is full proof that they do **actually exist**?

Is not the existence of the facts which the constitution requires, and not mere acts of county officers, which prior to the adoption of the present constitution of Illinois, might have estoped the county from inquiring into the facts.

But again, there are no recitals in any of said bonds or any of the orders of said County Court, which show that they were issued in accordance with the separate section of the constitution. There is no reference in anyway in any of the recitals in said bonds or in the orders of the County Court of said county, to said separate section of the constitution of Illinois. It is presumed that the framers of the constitution of Illinois, and the people who adopted it, knew the rules announced by this court as to recitals in bonds of this character. How then can it be argued that this proviso in the constitution of Illinois, adds nothing to the importance of the saving facts therein mentioned, nor affect the character of the evidence and certainty by which they shall be established.

Hence, I claim that the recitals in the orders of the County Court, and in the bonds relative to the result etc., of the election held Feb. 19th 1870, are not sufficient but that the plaintiff in Error should have shown by proper evidence, that all the requirements of the law then in force in Illinois relative to a special elections were complied with.

These bonds should have recited, that they are issued in accordance with the saving proviso of the constitution of Illinois. There is no evidence whatever, showing that any notice was given of the election held Feb. 19th 1870.

The Supreme Court of Illinois in the leading case of The People vs. Jackson County 92nd Ill. 452, in construing said separate section of the constitution say: "This prohibition of the constitution is general and positive **in all** cases except those saved by the proviso, and it is a well recognized rule that a party claiming a right saved by a proviso in a statute, **must show that the right so claimed is clearly within the proviso, and until this is done the presumption is that it is embraced within the enacting clause."**

The Supreme Court of Illinois, in passing on the validity of bonds issued by a municipality in Illinois, since the adoption of the present constitution, in case of Town of Prairie et al. vs. Lloyd et al. 97th Ill. 179, say: "The bonds in question having been issued after the present constitution, went into effect, the burden of showing they were issued in compliance with a vote of the people of the town had prior to the adoption of the present constitution, in pursuance of same law then providing therefor, rests upon those affirming their validity. And in the same case the court also say: "The bonds **prima facie are invalid; hence without such proof the tax in question would clearly appear to have been levied without authority of law, and should therefore be enjoined."**

There is not one word of evidence in the record in the case at bar which even tends to show that said bonds were issued in compliance with a vote of the people of said county under any law authorizing their issue, and no attempt has been made to show that they were so issued, nor is it claimed by plaintiff in error that there is any proof which tends in anyway to show that they were issued in compliance with a vote of the people of said county under any law authorizing their issue. We submit that the decision of the Supreme Court in Town of Prairie et al. vs. Lloyd et al. supra. being a judicial construction of the constitution of the State by the Supreme Court of the State is decisive of the questions in the case at bar, and shows conclusively that each of said bonds are void.

Does not the date and time of maturity of these bonds raise on their face a suspicion against them, and put every prudent man upon inquiry?

From every standpoint it seems to me that both series of bonds are void, and that the judgment rendered by the Circuit Court in this case, is fully supported by authority and reason, and that it should be affirmed.

THOS. J. LAYMAN,
Attorney for Defendant in Error.

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136-692

Office Supreme Court, U. S.
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MAR 9 1894
JAMES H. McKENNEY,
CLERK

UNITED STATES OF AMERICA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A.D., 1893.

No. 330.

THE CITIZENS' SAVINGS & LOAN ASSOCIATION,
Plaintiff in Error.
vs.
THE COUNTY OF PERRY, *Defendant in Error.*

BRIEF OF POINTS FOR PLAINTIFF IN ERROR,

By WILLIAM B. SANDERS, OF
SQUIRE, SANDERS & DEMPSEY,
of Counsel for Plaintiff in Error,
CLEVELAND, OHIO.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF ILLINOIS.

IN THE

Supreme Court of the United States.

THE CITIZENS' SAVING AND LOAN ASSOCIATION,
Plaintiff in Error.

vs.

THE COUNTY OF PERRY,
Defendant in Error.

No. 330.

BRIEF OF POINTS FOR ORAL ARGUMENT,

By WILLIAM B. SANDRES, of Squire, Sanders & Dempsey, of Counsel for Plaintiff in Error.

STATEMENT.

Under date of January 1st, 1891, the County of Perry, State of Illinois, issued a series of one hundred bonds of $1,000 each, in payment of a subscription to the capital stock of the Belleville & Southern Illinois Railroad Company to an amount equal to the bonds issued. The bonds were in the following form:

No. 11. UNITED STATES OF AMERICA. $1,000.

UNITED STATES OF AMERICA, STATE OF ILLINOIS.

PERRY COUNTY, }
STATE OF ILLINOIS. }

BOND.

Know all Men by these Presents, That twenty years after date the County of Perry, in the State of Illinois, promises to pay to the Belleville & Southern Illinois Railroad Company, or

bearer, one thousand dollars for value received, with interest from date at the rate of seven per cent. per annum, payable annually on the presentation of the proper coupon hereto annexed.

This bond is one of a series of one hundred of like tenor and date, issued under the authority and in accordance with the requirements of an act of the legislature of the State of Illinois, entitled "An act to incorporate the Belleville & Southern Illinois Railroad," approved February 14th, 1857, and is redeemable at the pleasure of said County, at any time after the first day of January, A. D., 1876.

In Witness Whereof, I, Charles E. R. Winthrop, Judge of the County Court of Perry County, have hereunto set my hand, and caused the seal of said county to be affixed, and the Clerk to countersign the same, at Pinckneyville, the first day of January, A. D., 1871.

CHARLES E. R. WINTHROP,
County Judge.

J. CARROLL HARRISS,
County Clerk.

SEAL.

Endorsed: { AUDITOR'S OFFICE, ILLINOIS,
{ SPRINGFIELD, January 2nd, 1871.

I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled, "An —— to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16th, 1869.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

C. E. LIPPINCOTT,
Auditor, P. A.

SEAL.

And upon July 1st, 1871, and January 1st, 1872, the county made another issue of bonds in payment of its subscription to the stock of the Chester & Tamaroa Coal & Railroad Company, the last named bonds being in the form following.

$1,000 $1,000 $1,000 $1,000 $1,000 $1,000

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF PERRY. $1,000.

Registered in the office of the Auditor of Public Accounts, of the State of Illinois.

Principal and interest collected and paid by the treasurer of the State of Illinois.

Know all Men by these Presents, That the County of Perry, State of Illinois, is indebted unto the Chester & Tamaroa Coal & Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States, with interest from date at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July of each year, at the American Exchange National Bank, in the city of New York, on the presentation and surrender of the respective interest coupons hereunto annexed. The principal of this bond shall be due and payable at any time within twenty years from the date hereof, at the option of said county, at said bank in New York City.

This bond is one of a series of bonds issued by the County of Perry, in payment of one thousand dollars of the capital stock of the Chester & Tamaroa Coal & Railroad Company, in pursuance of an election held by the legal voters of Perry County, Illinois, on the 19th day of February, 1870, and by virtue of the provisions of an act of the General Assembly of the State of Illinois, entitled, "An act supplemental to an act entitled 'An act to provide for a general system of railroad incorporation,'" approved November 6th, 1849.

And for the payment of said sum of money and accruing interest thereon, in the manner aforesaid, the faith of the County of Perry, State of Illinois, is hereby irrevocably pledged, as also its property, revenue and resources.

In Testimony Whereof, The County Court of said County of Perry, have caused these presents to be signed by the county judge, and by the clerk of the County Court of said county, and to be sealed with the seal of said Court at Pickneyville, in said county, on this first day of July, A.D., 1871.

CHARLES E. R. WINTHROP,
County Judge.

J. CARROLL HARRISS,
County Clerk.

SEAL

Endorsed: { AUDITOR'S OFFICE, ILLINOIS,
{ SPRINGFIELD, November 17, 1871.

I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled, "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns, in force April 16, 1869."

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

C. E. LIPPINCOTT,
Auditor, P. A.

SEAL

Plaintiff in error is a *bona fide* holder of a portion of each of the series of bonds above described and brought its action in the Circuit Court to recover upon interest coupons due January, 1889. For each issue of these bonds the County received stock in the Railway Company, to which they were issued for an amount at par equal to the bonds issued. For seventeen years following the issue of the bonds the County regularly paid the annual interest as it became due.

Both of said railroads were constructed and in operation before the bonds were issued, and the County, at the time of the trial below, retained, and still retains, the stock in payment of which it so issued these bonds.

HOLDING OF CIRCUIT COURT.

The Circuit Court (Record 112) held these bonds invalid for the reasons following: As to the Chester & Tamaroa Railroad Company, the bonds were found to be void for want of power on the part of the Perry County authorities to issue them, and that the proposition of the county to take $100,000 of stock did not receive a majority of the qualified voters of the county at the election called for the purpose of voting upon the question of their issue.

As to the bonds issued to the Belleville & Southern Illinois Railroad Company, the Court found them invalid because the election notices contained a clause providing that no bonds should be issued or stock subscribed until the Railroad Company should locate their machine shops at Duquoin; that the shops were not located there but at East St. Louis; and that the condition imposed by the vote was a part of the authority for the subscription within the meaning of the proviso to the article of the Constitution of the State of Illinois of 1870.

ASSIGNMENT OF ERROR.

1. We contend that as to both issues of bonds the laws of Illinois then in force gave to the county ample authority for their issue in exchange for the stock of the Railway Company.

2. That by the recitals upon the face of the bonds the county is estopped as against the plaintiff, a *bona fide* holder, to avail itself of a defense setting up irregularity attending the issue, or the fact that some condition as to construction of the road had not been complied with at the time the bonds were delivered.

3. The fact of the registration of the bonds by the State Auditor upon the statutory and verified certificate of the County Judge, to the effect that all conditions precedent to the issue had been complied with, should have been held to estop the county from making the defense sustained in the Circuit Court.

4. The fact that the county recognized the validity of these bonds for seventeen years by the payment of interest, and that it received and still retains the agreed consideration, namely, the stock of the Railroad Company, should have been held a waiver and ratification by the county precluding the defenses sustained below.

POINTS OF ARGUMENTS.

First. The bonds issued to the Belleville & Southern Illinois Railroad Company recite, "This bond is one of a series of one hundred of like tenor and date, issued under the authority and in accordance with the requirements of an act of the legislature of the State of Illinois, entitled 'An act to incorporate the Belleville & Southern Illinois Railroad,' approved February 14th, 1857, and is redeemable at the pleasure of said county, at any time after the first day of January A. D., 1876."

The Statute thus referred to upon the face of the bond will be found in the record (pages 45 to 50), and in section 9 it is provided, in substance, that the directors of said Com-

pany shall have power to open books and receive subscriptions to the capital stock of such terms and in such amounts as they deem for the interest of the company "from any other railroad company or corporation and from any county, city, town or village making the same, provided said subscriptions shall be made in every respect subject to the provisions and restrictions of an act supplemental to an act, entitled 'An act to provide for a general system of railroad incorporations, approved November 6th, 1849.' The fair construction of this act is to make legal subscriptions by counties to the capital stock of this railroad company, provided such subscriptions are made in accordance with the general railroad act of 1849.

General Railroad Act, November 6th, 1849. (*Record* 44).

This act provides, in substance, that whenever the citizens of any city or county desire that such city or county should subscribe for stock in any Railroad Company, they are authorized to make such subscription in any sum not exceeding $100,000, and for the payment of such stock the judges of the county court are authorized to borrow money to make payment of such subscription in the bonds of the county, it being required, that before such subscription shall be made and bonds issued, the question shall be submitted to the electors, and that a majority of the qualified voters of such county or city, taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription, shall vote for the same. It thus appears that the county, by virtue of the act recited upon the face of the bond, did have authority to make this subscription and issue its bonds therefor.

Second. The bonds issued to the Chester & Tamaroa Railroad Company were issued under the same act and recite upon the face of each bond as follows: "This bond is one of a series of bonds issued by the County of Perry, in payment of $100,000 of the capital stock of the Chester & Tamaroa Coal and Railroad Company, in pursuance of an election held by the legal voters of Perry County, Illinois, on the 19th day of February, 1870, and by virtue of the provisions of an act of the General Assembly, of the State of Illinois, entitled, "An act supplemental to an act entitled 'An act to provide for a general system of railroad incorporation,' approved November 6th, 1849." As we have already seen, this general railroad act of 1849, did authorize the county to issue these bonds.

Third. The question as to whether the County had authority, acting in accordance with the statute referred to upon the face of the bonds, to issue the same, must be answered in the affirmative, as the act of 1849 gives such authority in express terms.

RECITALS.

Fourth. The bonds recite, in substance, that they are issued in accordance with a statute which authorizes the issue of such bonds. The recital amounts to a representation by the county that the conditions of the statute have been complied with, and the purchaser was not bound to look

further for evidence of compliance with the conditions to the grant of power.

Commissioners of Knox County vs. Aspinwall, 21 Howard.

Town of Colona vs. Eaves, 92 U. S., 484.

Insurance Company vs. Bruce, 105 U. S. 328.

Pana vs. Bowler, 107 U. S. 528.

Oregon vs. Jennings, 119 U. S. 74.

Fifth. Treating the question of the power to issue these bonds, as controlled by the act of November 6th, 1849, recited upon the face of each bond, the Court below was clearly wrong in holding them void as to a *bona fide* holder, as having been issued without authority, even though it appeared that in fact some of the conditions of the statutes had not been complied with.

Sixth. But it was and is contended that as to the Chester & Tamaroa bonds the proposition to issue the same, "did not receive a majority of the qualified voters of the county." And as to the Belleville & Southern Illinois Railroad bonds, that the election notice contained a clause imposing, among other conditions, that no bond should be issued, or stock subscribed, until the Company should locate machine shops at Duquoin, and that the evidence tended to show that shops were not located at Duquoin, but at East St. Louis, and the Court below held that the conditions imposed by the vote were a part of the vote and a part of the authority for the subscription within the meaning of the proviso of the Constitution of 1870, relating to municipal railroad aid bonds;

and in support of this holding the Court, in the memorandum found in the record, (page 112) cites the cases of *Town of Eagle vs. Kohn*, 84 Ill., 290, and later cases in Illinois to the same effect, and *German Savings Bank vs. Franklin County*, 128 *U. S.* 526, decided by this Court in 1888.

The amendment to the Constitution referred to, so far as material to this discussion, is as follows: (Record page 51). "No county, city, town, township or other municipality, shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation, provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption."

The bonds under discussion were authorized by vote as follows: *The Chester & Tamaroa bonds, February 19th*, 1870. *The Belleville & Southern Illinois Railroad bonds, July 3rd*, 1869. The amendment to the Constitution did not take effect *until July 2nd*, 1870, so that the right to issue the bonds was in no wise affected by the amendment; but the authority to issue them is within the express reservations of the proviso.

County of Clay vs. Society for Savings, 104 *U. S.* 579.

Seventh. If, then, the validity of these bonds is to be determined by the act referred to upon the face of the bond, which in legal effect is the general railroad act of 1849, and the Constitution of 1870, it clearly appears that the county had power to issue them, and its recitals precluded it from defending upon allegations of failure to observe some of the conditions imposed in the grant of power under which it acted.

ACT OF APRIL 16TH, 1869.

Eight. At the time these bonds were issued there was in force in Illinois an act passed April 16th, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," and while no reference is made to this act on the face of the bonds, it is true that in the election notices it is provided (Record 24) "That the bonds shall be issued under the provisions of the act of the Legislature of Illinois of November 6th, 1849, an act of April 16th, A. D., 1869," and as to the other issue, (Record 26) the election notice provided, "Said bonds to be registered and paid as provided in an act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities and towns, in force April 16th, 1869.'"

From the fact that the Circuit Court cites as authority for the ruling made, *Eagle County vs. Kohn*, 84 Illinois, and *German Savings Bank vs. Franklin County*, 128 U. S., it seems apparent that the act of April 16th, 1869, was treated as in some way affecting the validity of these bonds, even in the hands of a *bona fide* holder. In reference to this act of April, 1869, it is to be observed that it is not an act granting power to issue bonds, but relates solely to the exercise of an existing power under other statutes, and provides for registration with the Auditor of State upon certain terms prescribed in the act.

Section 7 (Record 51) provides, among other things, that any county making subscription to a railroad company, "Shall have the right" to prescribe the conditions upon which such bonds or donations shall be made, and that such bonds shall not be valid until such conditions precedent shall have been complied with. The act nowhere required that conditions should be prescribed, so that, notwithstanding its provisions, the county could still issue bonds as provided in the general railroad act of 1849; and, if the voters so elected,

might issue its bonds without any conditions as to construction of the road, the location of machine shops, etc. This not only is clear from an inspection of the act, but has been expressly so determined by this Court in *Insurance Company vs. Bruce*, 105 *U. S.* 328. This Court, having under consideration Section 7 of the act of April 16th, 1869, said, (page 331) "*The statute did not make it obligatory on the town to impose conditions upon the performance of which its liability should depend. It conferred simply the right to do so, leaving the town at liberty to prescribe conditions or to make an unconditional subscription. Consistently with the statute, the town could issue and deliver bonds for the subscription in advance of the construction of any part of its road.*" It follows that even though the purchaser of these bonds was bound to take notice of the act of April 16th, 1869, that act did not advise him that any conditions as to machine shops, etc., had been prescribed with reference to the issuing of the bonds in question. The act did not require the county to impose any such conditions, and as declared in Insurance Company vs. Bruce, supra, "*Where a city, having by statute authority to make an unconditional subscription to the stock of a railroad company, and to deliver its bonds in advance of the construction of the road, issued them, representing in effect by their recital that they conformed to the statutory requirement, and that its liability thereon was complete: Held, that the bonds are valid in the hands of a bona fide holder for value, and that the city is estopped from showing that it had imposed certain conditions upon its liability, although the statute declares that in such an event the bonds should not be binding until such conditions were performed.*"

EAGLE COUNTY vs. KOHN, 84 ILLINOIS.

The validity of this issue of bonds is in no wise affected by the ruling of the Supreme Court of Illinois in *Eagle County*

vs. Kohn, supra, and its subsequent rulings upon the same subject, because these bonds were issued in 1870 and 1871. This ruling of the Supreme Court of Illinois was made long subsequent, namely, in 1876. Again, the case at bar, like the case of *Insurance Company vs. Bruce*, supra, is clearly distinguishable from *Eagle County vs. Kohn* in this, "that it does not appear from the report of the latter case that the town had, by the recitals in its bonds, estopped itself from asserting as against a *bona fide* holder, the non-performance of conditions imposed by a popular vote. Had the town of Bruce represented in express words upon the face of the bonds that no conditions whatever were prescribed by the people, or that the subscription was unconditional, the State Court would not, we suppose, adjudge that the town, as against a *bona fide* holder, could take shelter behind the statutory provision in question. In the present case the town of Bruce did not make, in express terms, a representation of that character, but in effect by the recitals in its bonds, it did represent to the public that the bonds were issued in all respects in conformity to law and that nothing remained to be done which was essential to its liability thereon. The town, having power under the statute to make an unconditional subscription, and to issue and deliver its bonds in advance of the construction of the road, what was said in Brooklyn vs. Insurance Company (99 U. S. 362) may be repeated here. 'It is now too late for the town to claim exemption as against *bona fide* purchasers upon the ground that the Railroad Company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice, either from the Statute or otherwise.'"

German Savings Bank vs. Franklin County, 128 *U. S.* 526.

This case was decided adversely to the validity of the bonds in question, upon the ground that the bonds were not issued until after the decision of the Supreme Court of Illinois, in *Eagle County vs. Kohn*, supra, and this fact with the other facts commented upon by the Court, brought the case clearly within the ruling of the Supreme Court of Illinois, which being a construction of a statute of that State would, in such a case, be followed by this Court; and the Court say, "That when the Savings Bank purchased the bonds it was required to take notice of the construction given to such statutory provision by the Supreme Court of Illinois at its September term, 1876, prior to the issue of these bonds in the case of the town of *Eagle vs. Kohn*, 84 Illinois, 292."

In the case at bar the bonds were issued almost six years before this ruling of the Supreme Court of Illinois, and as observed by this Court in *Oregon vs. Jennings*, 119 U. S. 74, "We are not referred to any decision of the Supreme Court of Illinois made prior to the issuing of the bonds in question which holds to the contrary of the views we have announced."

That these bonds, issued in the circumstances and with the recitals made, are in no wise affected by the decision of the Supreme Court, of Illinois, made in 1876, and by reason of which this Court ruled as appears in German Bank vs. Franklin, *supra*, see the following cases, each of which involves bonds issued by municipalities in the State of Illinois, in which similar defenses to those interposed here were held insufficient.

Insurance Company vs. Bruce, 105 U. S. 328.
Pana vs. Bowler, 107 U. S. 529.
Oregon vs. Jennings, supra.
Cairo vs. Zane, 149 U. S.

Ninth. The certificate of this County Judge, required by the statute and filed with the Auditor of State, and the subsequent registry of these bonds made by the Auditor, furnish sufficient evidence to a purchaser of the existence of the facts upon which alone the bonds could be registered. Each of the bonds in question bears an endorsement substantially as follows: "*I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of the act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities and towns in force, April 16th*, 1869.'

In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office, the day and year aforesaid."

The Auditor acted upon certificate of county judge, a copy of which appears in the record (page 35.)

The act of April 16th, 1869, expressly required, as a condition precedent to the registration of the bond, that it may receive any of the benefits of the act, that the subscription should first be submitted to an election of the legal voters of the county, and that a majority of the legal voters should have voted in favor of such subscription; and that any county should have the right to prescribe the conditions upon which the bonds should be issued and that such bonds should not be valid until such conditions precedent should have been complied with; and that the presiding judge of the county court, immediately upon the completion of the railway to or through such county as may have been agreed upon, and the running of cars thereon, should certify "under oath that all the preliminary conditions in this act required to be done to authorize the registration of such bond, and to entitle them to the benefits of this act have been complied with, and shall transmit the same to the State Auditor with

a statement of the date, amount, number, maturity and rate of interest of such bond, and to what company and under what law issued; and thereupon the said bond shall be subject to registration by the State Auditor, as hereinbefore provided. The legal effect of this provision is to constitute the county court the tribunal to determine whether or not all of the conditions precedent to the issue of the bond have been complied with, and to direct the Auditor of State, acting upon such determination, as certified to him by the County Judge, to admit the bond to registration. In other words, before these bonds could be registered, it had been determined by the tribunal provided in the act for that purpose, and by the Auditor of State, that all of the conditions precedent to the issuing of these bonds had been complied with. Certainly, the purchaser of the bond was not required to look beyond this certificate and registration, but might safely rely upon the determination of these questions as certified by the properly constituted authorities of the county. And so this Court determined, as we understand the holding in *Cairo vs. Zane* 149 *U. S.* Speaking of the effect of the recitals and the certificates of registration under the act of the Legislature of Illinois of April 16th, 1869, this Court say: "*It is unnecessary to affirm that the certificates are so clear and unambiguous, (School District vs. Stone*, 106 *U. S.* 183), *as to estop the city from showing that the bonds were issued in violation or without authority of law, or that they, in conjunction with the certificate, foreclose all possible defenses; but when the law of the State provides for a registry of municipal bonds, and certificate thereof, such certificate should be held as sufficient evidence to a purchaser of the existence of those facts upon which alone bonds can be registered.*

"*If the plaintiff in this case, not resting upon the mere terms of the certificate, had examined the records of the Auditor's office, he would have found there the certificate under oath of the Mayor of the city, of the election, its date and facts necessary to warrant the*

issue of the bond, such officer being the one named in the statute as the one to furnish to the Auditor the evidence necessary to justify the registry. Can it be that a purchaser, with this evidence before him, is not protected by the statement upon the face of the bonds that they were issued in payment of a subscription? Is it his duty to examine all the proceedings to see whether that which was a subsciption in the first instance was called a subscription all the way through, and was named as a subscription in the bond, had not been transformed by some action of the City Council into a donation? It will be borne in mind that it is not a matter of law, but of fact, in respect to which an estoppel is urged against the city by virtue of the recitals and the fact of registry." This language, and the principle recognized by the Court, is, from every point of view, applicable to the case at bar, and certainly the purchaser of these bonds was justified, and should be protected in purchasing upon the faith of the certificate by the county judge, and the subsequent registry of the bond, where it appears that under the express provisions of the act the bonds could not have been registered unless all of the conditions precedent to their issue have been complied with.

Tenth. The County, having for seventeen years recognized the validity of these obligations, and still retaining the consideration paid to it, namely, stock in the Railroad Company, has, by such conduct, ratified the act of the county authorities in issuing these bonds, and cannot now be heard to allege their invalidity as against a *bona fide* holder. The rule which we here invoke has been many times applied in this Court.

In Supervisor vs. Schneck, 5 *Wall*, 772, it was held:

"The levy of a tax and payment of interest by the proper

county authorities, validates in the hands of *bona fide* holders for value, county bonds issued in their origin, irregularly, as *ex. gr.* in virtue of a popular vote orderd by a county court instead of one ordered by the Board of Supervisors." In this case the tax had been levied and the interest paid by the county for seven years before it was set up that the bonds were void.

In Pendleton vs. Amy, 13 *Wall*, 298, *it was held*:

"A county issuing bonds to a Railroad Company in payment of stock in the road, which subscription the county was authorized by legislative enactment to make, and to pay for by the issue of the bonds only after certain things directed had been performed, may be estopped against asserting that the conditions attached to a grant of power were not fulfilled, where the issue of the bonds without such previous fulfillment would be a misdemeanor by the county officer, it is to be presumed, though perhaps not conclusively, that the conditions were fulfilled, *and an estoppel would take place where the county had received the proper amount of stock for which the bonds were issued, had held it for seventeen years and was actually enjoying it at the time when pleading want of authority to subscribe.*"

In the case at bar the county has received the proper amount of stock for which the bonds were issued; it had held it for seventeen years and was actually enjoying it at the time when it pleaded want of authority to subscribe in the Court below, and it is still retaining the consideration for which these bonds were issued.

This same rule is recognized in *Commissioners of Johnson County vs. January*, 94 *U. S.*, 202; *County of Clay vs. Society for Savings*, 104, *U. S.* 579; *County of Randolph vs. Post*, 93 *U. S.* 502; *County of Leavenworth vs. Barnes*, 94 *U. S.* 70. *Anderson County vs. Beal*, 113 U. S. 227, where the Court held:

"The issue of the bonds not having been enjoined for two years and a half between the day of election and the time the company parted with the bonds, for value, and the county, having for ten years paid the interest annually on the bonds, it was estopped as against the plaintiff from defending on the ground of a want of a proper notice of the election."

The County of Perry has recognized its liability upon these bonds for seventeen years. It has received and still retains the consideration, this being a valuable consideration, for which it delivered them. As against the plaintiff, the defense interposed, in a court of morals, would be at once condemned as dishonest. In a Court of Justice it should be equally unavailing.

Respectfully submitted,

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Of Counsel for Plaintiff in Error.